TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 214

PASQUALE LIBERATO AND ANNA CAPON LIBERATO, BY THEIR ATTORNEY-IN-FACT, GIOVANNI DISANTO, PLAINTIFFS IN ERROR,

vs.

S. A. ROYER & ALBERT HERR, TRADING AND DOING BUSINESS AS ROYER AND HERR, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

FILED DECEMBER 1, 1934

(30,715)

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 1, 1925

[fols. 1 & 2] **IN SUPREME COURT OF PENNSYLVANIA**

WRIT OF ERROR—Filed Oct. 1, 1925

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judges of the Supreme Court of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Pennsylvania Supreme Court, before you, or some of you between Pasquale Liberato and Anna Maria Capon Liberato by their Attorney-in-fact Giovanni Disanto, Appellants, against S. A. Royer & Albert Herr, trading and doing business as Royer and Herr; Travelers Insurance Company, Insurance Carrier, Appellees, a manifest error hath happened, to the great damage of the said Appellants in the Supreme Court of Pennsylvania, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the same at the City of Washington, D. C., within thirty days, in the said United States Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William Howard Taft, Chief Justice of the Supreme Court of the United States, at Scranton, the 30th day of September in the year of our Lord one thousand nine hundred and twenty-four.

G. C. Scheuer, Clerk of the Dist. Court of the United States.
(Seal of U. S. District Court, M. D., Penna.)

Allowed by Chief Justice Von Moschzisker, Supreme Court of Pennsylvania.

[fol. 3] [File endorsement omitted.]

[fols. 4 & 5] CITATION—In usual form, showing service on Beidleman & Hull; filed Oct. 1, 1924; omitted in printing

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[fol. 6] IN SUPREME COURT OF PENNSYLVANIA

No. 6, May Term, 1924

PASQUALE LIBERATO and ANNA MARIA LIBERATO, by Their Attorney-in-fact, GIOVANNI DE SANTO, Appellants,

vs.

S. A. ROYER and ALBERT HERR, Trading and Doing Business as Royer & Herr, and Travelers Insurance Company, Insurance Carrier

Appeal of Plaintiffs from Judgement of the Superior Court, No. 30; March Term, 1923

DOCKET ENTRIES

Aug. 14, 1923.—Petition for allowance of appeal filed.

August 30, 1923.—Appeal allowed and case set for argument in the Western District, during the week of October 1st, 1923. Per Curiam. S.

Aug. 31, 1923.—Exit writ rtble. 1st Monday of October, 1923.

[fol. 7] Aug. 31, 1923.—Record filed.

" " " —Certified to Western District in accordance with above order.

Sep. 8, 1923.—Motion for continuance filed.

1923, Sept. 12.—Prayer of petition granted, place on list mentioned within. R. Von M., C. J.

May 21, 1924.—Assignments of error filed.

" 26, " —Argued.

Jul. 8, " —Judgment affirmed. Per Curiam. M.

" 18, " —Petition to hold record filed.

And now, this 21st day of July, A. D., 1924, upon consideration of the foregoing petition and upon the representation that the above appellants will present to the Supreme Court of the United States petition in the above entitled case for a Writ of Error therein, it is

Ordered that the record in the above-entitled case be held by the Prothonotary of this Court and be not remitted to the Court of Common Pleas of Dauphin County until the expiration of thirty days from the date hereof.

Simpson, Justice.

Aug. 13, 1924.—Petition for reargument filed.
" " " —Petition for allowance of appeal to Supreme Court of the United States filed.
Aug. 13, 1924.—Certificate of notice to counsel for defendants filed.
[fol. 8] Sept. 22, '24.—(Petition for reargument.) Refused. Per Curiam.
Sept. 22/24.—(Petition for allowance of appeal.) Granted. R. Von M., C. J.
Oct. 1, 1924.—Writ of error from Supreme Court of the United States filed.
Oct. 1, 1924.—Assignments of error filed.
" " " —Citation from Honorable Robert von Moschzisker, Chief Justice of Supreme Court of Pennsylvania, filed.
Oct. 4, 1924.—Service accepted. Beidleman & Hull, Attys. for Defts.
Oct. 16, " —Bond on Writ of error in the sum of $500.06, Approved by Hon. Robt. von Moschzisker, Chief Justice of Pennsylvania, filed.
Oct. 16, 1924.—Written stipulations as to record filed.

[fol. 9] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

Appeal of Defendants from decision of Common Pleas of Dauphin County, No. 397, June Term, 1922

DOCKET ENTRIES OF SUPERIOR COURT

[fol. 10] Jan 30, 1923.—Appeal and affidavit filed.
Eo die.—Exit writ rtble. 2nd Monday of March, 1923.

Feb. 26, 1923.—Assignments of error filed.
Mar. 10, " —Record filed.
" 12, " —Submitted.
" 19, " —Argued.
Jul. 12, " —Judgment affirmed and record remitted for further proceedings. Per Porter, J.
Aug. 11, " —Opinion amended and refiled.
" 14, " —Petition for allowance of appeal to Supreme Court filed.
Aug. 30, 1923.—Appeal allowed and case set for argument in the Western District, during the week of October 1st, 1923. Per Curiam. S.
Aug. 31, 1923.—Record sent to Prothonotary Supreme Court.

[fol. 11] IN SUPREME COURT OF PENNSYLVANIA

STATEMENT OF THE QUESTIONS INVOLVED

1. Is not that part of Section 310 of the Workmen's Compensation Act of 1915, P. L. 736, which reads as follows:

"Alien widowers, parents, brothers and sisters not residents of the United States shall not be entitled to compensation."

unconstitutional because it contravenes the treaty between the United States and Italy proclaimed November 23d, 1871 (17 Stat. 845) as amended February 25th, 1913, which reads as follows:

"The citizens of each of the high contracting parties shall receive in the states and territories of the other and most constant security and protection for their persons and property and for their rights, including that form of protection granted by and state or national law which establishes a civil responsibility for injuries or for death caused by negligence or fault and gives to relatives or heirs of the injured party a right of action, which right shall not be restricted on account of the nationality of said relatives or heirs, and shall enjoy in this respect the same rights and privileges as are, or shall be granted to nationals, provided that they submit themselves to the conditions imposed on the latter."

2. Did not the treaty delete that part of Section 310, excepting alien non-resident parents, so that the contract of employment could not and did not contain that provision.

[fol. 12] IN COURT OF COMMON PLEAS OF DAUPHIN COUNTY

No. 297, Sept. Term 1921

PASQUALE LIBERATO and ANNA MARIA CAPON LIBERATO

vs.

S. A. ROYER and ALBERT HERR, Trading and Doing Business as Royer & Herr

FIRST OPINION—Filed March 22, 1922

BY THE COURT:

In this case the record discloses that the plaintiffs are non resident aliens, being citizens and residents of Italy who by their attorney-in-fact instituted an action in trespass against the defendants in the court of Common Pleas of Dauphin County to No. 624 January Term, 1917, to recover damages for the death of their son Gussippi Liberato, who was accidently killed on the 9th day of February, 1916, in this county, in the course of his employment with the defendants. In a case stated, this court decided that the plaintiffs were precluded from prosecuting their claim by an action in trespass for the reason

that neither the employe nor the employers filed the statement in writing provided in section 302 (a) of what is commonly known as the Workmen's Compensation Act, 1915, P. L. 736, rejecting the privisions of article three (III) of the act applicable to their contract of hiring and that therefore they were conclusively presumed to have accepted the provisions of the article and agreed to be bound thereby. After the passage of the Act of July 8, 1919, P. L. 764, being thereby authorized so to do, the claimants instituted proceedings before, and filed a claim with the Workmen's Compensation Board. The Travelers Insurance Company, the Insurance Carrier of the defendants was granted leave to intervene as party defendant. The matter came on for hearing before the Referee, from whose decision the claimants appealed to the Workmen's Compensation Board, and on March 2, 1920, the Board set aside the findings of fact and conclusions of law of the Referee and allowed a hearing de novo, which was held forthwith, and the testimony as taken [fol. 13] before the Referee was adopted and considered by the Board, and in consideration of the case, two questions were raised: (1) are the parents of the deceased who are citizens and residents of Italy entitled to compensation? (2) is there sufficient testimony in the case to warrant the Board to award compensation on the grounds of dependency? The Board in its opinion of October 20, 1921, held that the testimony required that the second question should be answered affirmatively; it also held that the plaintiffs, the parents of the deceased, being citizens and residents of Italy are not entitled to compensation for the reason that section 310, of the Act of 1915, P. L. 736, bars them from receiving compensation. From this decision the plaintiffs have appealed to this court.

At the argument another question was suggested, viz: that of the constitutionality of the Act of 1919, P. L. 764, this however was then not pressed, and was dropped by the defendants, and we therefore will not give it any consideration.

It is for us to determine the question, whether or not that part of section 310 of the Act of 1915, P. L. 736, which reads as follows:

"Alien widowers, parents, brothers, and sisters, not residents of the United States, shall not be entitled to compensation." is contrary to the law of the land?

It is contended by the claimants, but the contention is denied by the defendants, that it contravenes the treaty between the United States and Italy, proclaimed November 23, 1871 (17 Stat. 845) which reads as follows: "The citizens of each of the high contracting parties shall receive in the states and territories of the other the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives on their submitting to the con- [fol. 14] ditions imposed upon the natives." Which was amended February 13, 1913 (228 Fed. Rep. page 235) reads as follows:

"The citizens of each of the high contracting parties shall receive in the states and territories of the other the most constant

security and protection for their persons and property and for their rights, including that form of protection granted by any state or national law which established a civil responsibility for injuries or for death by negligence or fault and gives to relatives or heirs of the injured party a right of action, which right shall not be restricted on account of the nationality of said relatives or heirs, and shall enjoy in this respect the same rights and privileges as are or shall be granted to nationals, provided that they submit themselves to the conditions imposed on the latter.

The right of a dependent parent to recover compensation for the death of a child is purely statutory.

In the case of Miorana vs. Baltimore & Ohio R. R. Co.: 216 Pa. page 402, the Court said:

"At common law the death of a human being could not be complained of as an injury in a civil court, and therefore, could not be made the ground of an action for damages. While the statute allows such action at the suit of husband, widow, children or parents, the action is not for the enforcement of any right which was in the party killed, but for a wholly distinct cause not affecting in any way the estate or rights of such party; it is exclusively for such damages as the parties plaintiff in the action have sustained by reason of the death. As was said in Penna. R. R. Co. vs. Zebe, 33 Pa. 318, this latter is a new and independent right given by positive law—not cast upon the parties to whom the statute gives it by supervisorship as for injury done the decedent, but is for the wrong done to them as individuals. The measure of damages allowed in such cases is but another expression of the same truth; the damages are limited to the [fol. 15] pecuniary value of the life lost to those who sue, indicating clearly that the right to sue is not as though it came by succession as the right to recover what belonged to the party killed, but an independent cause of action for damages sustained by those who are allowed to bring the action.

What we have said sufficiently indicates the difference between the rights of the plaintiff and those of her husband, and the ground upon which the distinction is based. The injury for which plaintiff sues is her own peculiar injury resulting from the death of her husband, and not for injuries he received. A statute right is given our citizens in such case, but plaintiff, as we have seen, with respect to any such claim is not within any treaty privileges, but is simply an alien. This being the case the doctrine of Deni vs. Penna. R. R. Co.: 181 Pa. 525, applies."

The plaintiffs must rely for their recovery upon the Act of June 2, 1915, P. L. 736, which is entitled "An Act defining the liability of an employer to pay damages for injuries received by an employe in the course of employment; establishing an elective schedule of compensation; and providing procedure for the determination of liability and compensation thereunder." In Section 302 (a) it provides inter alia that "it shall be conclusively presumed that the parties have accepted the provisions of article three (III) of this act, and have agreed to be bound thereby, unless there be at the time of the mak-

ing, renewal or extension of such contract, an express statement in writing from either party to the other, that the provisions of article three (III) of this act are not intended to apply, etc." In this case there was no rejection of the provisions of article three (III) by either the employer or the employe, and they are therefore conclusively presumed to have accepted the provisions of the article and agreed to be bound thereby.

In the case of Liberato vs. Royer & Herr; 28 Dist. Rep. page 670, [fol. 16] 22 Dauph. Co. Reports, page 1, this court, by Kunkel, J., said "The rights and remedies provided by the act are substituted for those previously existing and the parties are limited thereto, see Gregutis vs. Waclark Wire Works; 86 N. J. L. 610; Mathison vs. Minn. St. Co.: L. R. A. 1916, D. 412," and in the same case this court, said: "his dependents are in the same position by express enactment in the event of his death" and "under circumstances like those agreed upon in this case, citizen parents, would be restricted to the remedy provided by the act, so also non-resident alien parents must be restricted likewise."

The Act provides in Article three (III), section 307, clause 7, that "If there be neither widow, widower, nor children, then to the father and mother, or the survivor of them if dependent to any extent upon the employe for support at the time of his death, twenty per centum of wages," and in the same section, clause 8 that "If there be neither widow, widower, children, nor dependent parent, then to the brothers and sisters, if actually dependent to any extent upon the decedent for support at the time of his death, fifteen per centum of wages for one brother or sister, and five per centum additional for each additional brother or sister, with a maximum of twenty-five per centum; such compensation to be paid to their guardian," and by section 310: "Alien widowers, parents, brothers, and sisters not residents of the United States shall not be entitled to any compensation."

By the treaty with Italy the relatives or heirs of the party injured by negligence or fault shall not be restricted on account of their foreign nationality, but shall enjoy in this respect the same rights and privileges as are enjoyed by our own citizens; they "shall receive in the states and territories of the other the most constant security and protection for their persons and property and for their rights, in-[fol. 17] cluding that form of protection granted by any state or national law which established a civil responsibility for injuries or for death caused by negligence or fault and gives to relatives or heirs of the injured party a right of action which right shall not be restricted on account of the nationality of said relatives or heirs, and shall enjoy in this respect the same rights and privileges as are or shall be granted to nationals, provided that they submit themselves to the conditions imposed on the latter."

It is true the Workmen's Compensation Act is not a statute providing for the payment of compensation for damages for any injury caused by negligence or fault only, it is a statute, as broad and comprehensive as it well might may be, providing for payment of

damages resulting from an injury sustained during the course of employment in any manner except such a one as is intentionally self-inflicted; it not only covers those cases that are not resultant from negligence or fault, but it as well covers those cases that are caused by negligence or fault which are the cases particularly cared for, by and embraced in the treaty. It is quite within the realm of probability that the greater number of cases of injury are in the latter class. Under the terms of the statute resident widowers, parents, brothers and sisters of the injured, under certain conditions are entitled to compensation, yet non-resident alien widowers, parents, brothers and sisters of the injured under the same conditions are plainly excluded and are not entitled to any compensation. This is a limitation imposed by the statute upon certain classes of alien non-residents which is not imposed upon our own citizens of the same classes. The former, with respect to damages for injuries through negligence or fault do not enjoy the same rights and privileges as are enjoyed by the latter, and yet the treaty provides in positive language that those of Italian nationality shall, in respect to [fol. 18] civil responsibility for injuries or for death caused by negligence or fault, enjoy the same rights and privileges as our own people enpoy. The statute deprives the one class of a right which it grants to the other. To do this we think is such a discrimination as to amount to a clear violation of the treaty made between the United States and the Italian Governments. It is a violation of the supreme law of the land and cannot be sustained.

In the case of Miorano vs. Baltimore & Ohio R. R. Co., 213 U. S., page 268, Mr. Justice Moody in delivering the opinion, said: "We do not deem it necessary to consider the constitutional limits of the treaty making power. A treaty within those limits by the express words of the constitution is the supreme law of the land, binding alike national and state courts, and is capable of enforcement, and must be enforced by them in the litigation of private rights."

We have been referred to but two opinions rendered since 1913, when the amendment to the treaty was made, upon this subject, both having been delivered within Pennsylvania, nor have we been able to find any others. The one is the case of Soiacono vs. Labaty Brothers: Department Reports, Vol. 7, page 901, in which the court held that this part of the Act of 1915, now under consideration is not in violation of the treaty. We have great respect for the learned Judge who rendered this opinion, but apparently, he declares that which he believes to be the law without giving any consideration to the amendment to the treaty. We do not concur in his opinion.

The other is the opinion of the then Attorney General (Brown) who on May 5, 1915, communicated it to the Secretary of State at Washington, D. C., reported in 43 Pa. C. C., page 205. The fallacy of this opinion, holding that this part of the act of 1915, now under [fol. 19] consideration is not a violation of the treaty with Italy, is that there is an admission therein of a substantial discrimination between the resident citizen and the alien non-resident (otherwise in the same class); the learned Attorney General amongst other things

says: "The proposed act provides for an elective system of compensation for injuries sustained. It denies to no one any subsisting rights, it merely provides a simpler, surer and more convenient method of enforcing those rights, for those who elect to take advantage of its provisions, and it imposes certain limitations in exchange for benefits conferred, amongst which limitations is the denial of alien widowers, parents, brothers and sisters not residents of the United States of the right to receive compensation under the act." He clearly points out a limitation which we think is a discrimination in violation and defiance of the treaty. He furthermore in the same paragraph says "and in respect of these persons, it may be said that it would be obviously unfair to impose on employers the obligation to conduct investigations in obscure parts of foreign countries to protect -hemselves from the claims of alleged dependent parents, brothers and sisters, who were not in fact in any way dependent, whereas wives and minor children require no proof as a rule, one way or the other." This in effect amounts to depriving one of a right, because it may be difficult or inconvenient for the defendant to defend against the claim of such right. This may be such a reason that the amendment to the treaty was unwise, but it is no reason which will justify the contravention of the Treaty.

We are therefore of the opinion that the portion under discussion of the statute is violative of the Treaty as amended in 1913, between the governments of Italy and the United States and is unconstitutional.

The exception filed by the plaintiffs are sustained, and the action of [fol. 20] the Board is reversed. The record with this opinion is directed to be remitted to the Workmen's Compensation Board for further hearing if necessary and determination in accordance with the conclusion herein reached.

John E. Fox, A. L. Judge.

[File endorsement omitted.]

[fol. 21] In Court of Common Pleas of Dauphin County

[Title omitted]

Second Opinion—Filed Jan. 2, 1923

By the Court:

The plaintiffs in this case are citizens and residents of Italy; the defendants Royer & Herr are operators of a stone quarry at Swatara Station, Dauphin County, Pennsylvania and there employed the son of the plaintiffs, Giovannia Liberato upon whom the plaintiffs were dependents and who was accidently killed in the quarry of the defendants on the 9th day of February, 1916, while in the course of his employment. The defendants were insured against injury to their workmen by the Travelers Insurance Company, and there-

fore the latter, upon its request, was permitted to intervene and thereby become a co-defendant.

After the passage of the Act of July 8, 1919, P. L. 764 plaintiffs by their attorney-in-fact, Giovanni DiSanto, instituted proceedings under the Act of 1915, P. L. 736 before and filed a claim with the Workmen's Compensation Board on account of the death of the son of the plaintiffs. The matter was heard before a Referee, from whose decision the claimant appealed to the Workmen's Compensation Board on March 2, 1920, and the Board set aside the findings of fact and conclusion of law of the Referee and allowed a hearing de novo which was held forthwith and the testimony as taken before the Referee was adopted and considered by the Board, and in the consideration of the case, two questions were there raised: (1) Are the parents of the deceased, who are citizens and residents of [fol. 22] Italy entitled to compensation? (2) Is there sufficient testimony in the case to warrant the Board to award compensation on the ground of dependency?

The Board in its opinion of October 20, 1921, in answer to these questions, held that the parents under section 310 of the Act of 1915, P. L. 736, were not entitled to compensation because they are citizens and residents of Italy and in answer to the second question raised, held that there was sufficient testimony in the case to warrant the Board to award compensation on the ground of dependency, but that for the reason as given, in the answer to the first question, compensation was not allowed. From this decision, the plaintiff appealed to this Court. In an opinion filed on the 22nd day of March, 1922, we reversed the action of the Board as to the claimants being barred by that portion of section 310 of the Act, which reads as follows:

"Alien widowers, parents, brothers and sisters not residents of the United States shall not be entitled to any compensation."

on the ground that that portion of the statute was violative of the treaty as amended in 1913 between the governments of Italy and the United States and that the claimant was entitled to recover, but because the Board did not find any amount to which the claimants would be entitled, we directed that the record, together with the opinion by this court be remitted to the Workmen's Compensation Board, for further hearing if necessary and determination in accordance therewith. Whereupon the Board held a hearing de novo and made an award in favor of the claimants and against the defendants at the rate of $2.40 per week from February 25, 1916, for a period of 300 weeks or $720.00, and in addition thereto the sum of $100 for funeral expenses of the deceased was awarded; from [fol. 23] which award the defendants have taken an appeal, and have filed the following assignments of error or exceptions to the decision of the Workmen's Compensation Board, which we now have before us, and which exceptions are as follows, viz:

1. The Workmen's Compensation Board erred in its second conclusion of law, which is as follows:

"The dependent met death by accident while in the course of his employment with the defendants as contemplated by the Workmen's Compensation Act of 1915, and Pasquale Liberato alias Pasquale Liberati and Anna Maria Capon Liberato alias Anna Maria Capon Liberati, father and mother of the decedent were, at the time of his death, wholly dependent upon him for support. They are therefore entitled to compensation as provided by the Act."

for the reason that section 310 of the Workmen's Compensation Act of 1915 provides as follows:

"Alien widowers, parents, brothers and sisters, not residents of the United States shall not be entitled to compensation."

The Board in its third finding of fact having found, as follows:

"Pasquale Liberato alias Pasquale Liberati and Anna Maria Capon Liberato alias Anna Maria Capon Liberati, the father and mother of the decedent had been for some time previous, and were at the time of his death, wholly dependent upon him for support and at the time of his death were residents of Bisenti, Italy, where they still reside."

[fol. 24] 2. The Workmen's Compensation Board erred in its third conclusion of law, which is as follows:

"The Act provides that alien parents are not entitled to compensation but it has been held in this case that the Act does not apply for the reason that the Act contravenes the Treaty existing between the United States and Italy. We therefore conclude as a matter of law on this authority that the claimants, notwithstanding the fact that they are non-resident alien parents, are entitled to compensation."

for the reason that Section 310 of the Workmen's Compensation Act of 1915, provides as follows:

"Alien widowers, parents, brothers and sisters, non-residents of the United States shall not be entitled to compensation."

3. The Board erred in making an award to the Claimants, which award is as follows:

"Compensation is accordingly awarded to the claimants Pasquale Liberato alias Pasquale Liberati and Anna Maria Capon Liberato alias Anna Maria Capon Liberati, and against the defendants, S. A. Royer and Albert Herr, trading and doing business as Royer & Herr, and their Insurance Carrier, The Travelers Insurance Company, at the rate of $2.40 per week from February 25, 1916, for a period of three hundred weeks (300), or $720.00.

There is also awarded to the claimants against the defendant and its Insurance Carrier the sum of $100.00 for funeral expenses of the deceased."

for the reason that claimants being non-resident, alien parents under section 310 of the Workmen's Compensation Act of 1915, are not entitled to compensation.

[fol. 25] 4. The Act of 1919, P. L. 764, under the authority of which this claim petition was filed, is unconstitutional as contravening the Constitution of Pennsylvania, particularly Article 1, Section 17.

5. The Act of 1919, P. L. 764, under the authority of which this claim petition was filed, is unconstitutional as violating the Constitution of the United States, particularly Article 1, Section 1."

The plaintiff has filed an exception in this court alleging that the Workmen's Compensation Board erred in not allowing interest on the amounts awarded to the plaintiff. The plaintiff filed this exception without authority of law. Under Section 425 of the statute the procedure is specified and he has failed to follow the same. Therefore his exceptions filed cannot be considered by us but must be dismissed which we now do.

Three question- are raised by the exceptions of the defendants, as follows:

(1) In that part of Section 310, which reads as follows:

"Alien widowers, parents, brothers and sisters, not residents of the United States shall not be entitled to compensation."

void so far as this case is concerned because it is in contravention of the treaty between the Governments of Italy and the United States?

(2) Did the deceased Giovanni Liberato and the defendants when they entered into the contract of employment and accepted the provisions of the act waive or discharge the rights of the claimants?

(3) Is the Act of 1919, P. L. 764, violative of the constitution of Pennsylvania, Article 1, section 17, and of the Constitution of the United States, Article 1, section 10.

[fol. 26] The first question: This same question was considered and disposed of by us in an opinion when the former appeal was before us. We there held that that portion of the act containing the words: "Alien widowers, parents, brothers and sisters, not residents of the United States shall not be entitled to compensation" is violative of the treaty, as amended in 1913, between the Governments of Italy and the United States and therefore in this case is to be regarded as void. It cannot stand; it cannot be treated as being in the act while the treaty is in force and the claimant is an Italian subject; the latter has a right to rely upon the treaty. We think the contracting parties must take notice of the same, and it may be said that the employe did rely upon it. What we say of course, is applicable only to such non-resident aliens whose countries have treaties with us which are contravened by this language of the act. In Cooley's Constitutional Limitations (7th Edition), page 259, it is said:

"When a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it; contracts which depend upon it for their consideration are void; It constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void in toto is true also as to part of an act which is found to be unconstitutional, and which, consequently, is to be regarded as having never, at any time, been possessed of any legal force."

What we said in the former opinion upon this subject may be taken as our present view and the conclusion therein reached as our conclusion now.

The second question: The appellant contends that the relation be- [fol. 27] tween the employer and the employe having been a contractural one, they adopted each and every part of the law known as the Workmen's Compensation Act as their contract, the parties to the contract and the dependent parents of the employe, even without the consent of the latter were bound by it, and whatever rights are conferred are not conferred by the statute but by the contract, and he places reliance for this contention in the cases of Anderson vs. Carnegie Steel Co.: 255 Pa., 33 and Krugh vs Lycoming Fire Insurance Co.: 77 Pa., 15. We think these cases are authority relative to the power of the contracting parties to waive their own rights and to bind themselves, but we do not think these decisions extend to the waving of rights and binding others not consenting who have an interest in the contract by the contracting parties. The law has established rights of dependents. A parent, dependent upon his son, has a collateral subsisting interest in the contract of employment made by the son and his employer. We may say it is a vested but contingent interest, contingent upon the death of the son. If through the negligence of the employer while in the course of his employment, the employe is injured which results in his death, the dependent parent may recover such damages as he sustains thereby. In the case of Miorana vs. Baltimore & Ohio R. R. Co.: 216 Pa., page 402, the court said:

"At common law the death of a human being could not be complained of as an injury in a civil court, and therefore could not be made the ground of an action for damages. While the statute allows such action at the suit of husband, widow, children or parents, the action is not for the enforcement of any right which was in the party killed, but for a wholly distinct cause not affecting in any way the estate or rights of such party; it is exclusively for such damages [fol. 28] as the parties plaintiff in the action have sustained by reason of the death. As was said in Penna. R. R. vs. Zebe: 33 Pa., 318 this latter is a new and independent right given by positive law—not cast upon the parties to whom the statute gives it by survivorship as for injury done the decedent, but is for the wrong done to them as individuals. The measure of damages allowed in such cases is but another expression of the same truth; the damages are limited to the pecuniary value of the life lost to those who sue, in-

dicating clearly that the right to sue is not as though it came by succession as the right to recover what belonged to the party killed, but an independent cause of action for damages sustained by those who are allowed to bring the action."

How can the parent be denied the right, thus given him by the law, by the contract of the employer and employer and employe, unless he consents to such denial? The right of one cannot be waived by another without the consent of the former. The son of a dependent father cannot enter into contract with his employer whereby the father not consenting shall be deprived of his right. The case is somewhat akin to the long line of cases in which is established the almost universal doctrine, that the beneficiary of a life insurance policy acquires a vested right of which he cannot be deprived subsequently without his consent, unless there is a power of change of beneficiary reserved. In the case of insurance, the insured and insurer by the execution of the contract vest the interest in the beneficiary, in the case of the dependent father, the law vests the interest in him; neither can be disturbed without his consent. In Endlich on the Interpretation of Statutes, page 637 the author says: "Nor of course can a party consent to the violation of a statute not made [fol. 29] for his benefit but for the security of another." So here, the employer and employe cannot destroy or waive the dependent parent's right under the law by a contract to which he is not a party and thus set the law at naught. We are of the opinion that the cases of Anderson vs. Carnegie Steel Company and Krugh vs. Lycoming Fire Insurance Co., supra decide that parties to a contract may therein agree to waive their own rights under the law, but they do not extend to a destruction or waiver of rights of others under the law of the land without their consent.

The third question: The section referred to, of the Constitution of Pennsylvania, provides:

"No ex post facto law, nor any law impairing the obligation of contracts, or making irrevocable any grant or special privileges or immunities shall be passed."

The section referred to of the Constitution of the United States, provides:

"No state shall enter into any Treaty Alliance, or Confederation; grant letters of Marque and Reprisal; coin Money; emit Bills of Credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of Attainder, ex-Post Facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility."

Counsel for defendants contends that the Act of 1919, P. L. 764, under the authority of which this claim was filed violates certain articles and sections of both constitutions. They do not specify in the exceptions, nor did they at the argument, nor do they in their brief, point out the respect in which the violations are had.

We are unable to find in the article and section referred to of the

Constitution of Pennsylvania any of its provisions violated. The [fol. 30] first provision refers to ex-post facto laws. Ex-post facto laws as used in the Constitution are limited to penal statutes: Myers vs. Lohr; 72 Sup. 472. The second provision refers to laws impairing the obligation of contracts and the third is, no law shall be passed making irrevocable any grant of special privileges or immunities. The Act of 1919, supra, affects the remedy and procedure only; it does not affect the contract; it is not in violation of the Constitution of Pennsylvania. For a full discussion upon this subject see Myers vs. Lohr, supra. Nor is it a violation of any part of the article and section referred to in the Constitution of the United States.

For these reasons the exceptions to the findings of the Workmen's Compensation Board are overruled, the appeal dismissed at the cost of the appellant, and the award of the Board hereby confirmed. Judgment is hereby directed to be entered in favor of the plaintiff and against the defendant in the sum of $820.00. The Prothonotary is hereby directed to certify this judgment to the Workmen's Compensation Board.

John E. Fox, A. L. Judge.

[fol. 31] [File endorsement omitted.]

[fol. 32] [Title omitted]

In Court of Common Pleas of Dauphin County

Exception of Defendants—Filed Jan. 24, 1923

And now, January 24th, 1923, the defendants except to the judgment of the Court entered January 2nd, 1923, overruling the exceptions to the findings of the Workmen's Compensation Board and confirming the award of the said Board.

Beidleman & Hull, Attorney for Defendants.

Exception granted. John E. Fox, A. L. J. (Seal).

January 24th, 1923.

[fol. 33] [File endorsement omitted.]

[fol. 34] [Title omitted]

In Court of Common Pleas of Dauphin County

Statement of the Case—Filed Feb. 7, 1923.

Pasquale Liberato and Anna Maria Capon Liberato are residents of Bisenti, Italy and are the father and mother of Guiseppi Liberato. The said Guiseppi Liberato was unmarried and without issue on the

9th day of February, 1916. On the 9th day of February, 1916, the said Guiseppi Liberato was instantly killed in the quarry of the defendants located at Swatara Station, Dauphin County, Pennsylvania, in the course of his employment for the defendants. The plaintiffs were dependent upon the earnings of the said Guiseppi Liberato before and at the time of his death, to whose support he regularly contributed from his earnings. Deceased did not reject the provisions of the Workmen's Compensation Act.

Plaintiffs brought an action in trespass against the defendants in the Court of Common Pleas of Dauphin County on January 4th, 1917, to No. 642 January Term, 1917, to recover damages for the death of their son, the deceased employe, Guiseppi Liberato. The case was presented to the Court on a case stated and the Court in an [fol. 35] opinion by Judge Kunkel, 28 District Reports 670, held that it did not have jurisdiction, as it was a matter for the Workmen's Compensation Board. The case was then certified from the Court of Common Pleas of Dauphin County to the Workmen's Compensation, as provided by the Act of Assembly of July 8th, 1919, P. L. 764. On November 29th, 1917, claimants filed a claim petition No. 9082. On December 10th, 1919, the Travelers Insurance Company, the insurance carrier of the defendant, was granted leave to intervene as party defendant.

The matter was heard before a Referee, from whose decision the claimant appealed to the Workmen's Compensation Board on March 2nd, 1920, and the Board set aside the findings of fact and the conclusions of law of the Referee and allowed a hearing de novo, which was held forthwith and the testimony as taken before the Referee was adopted and considered by the Board and in consideration of the case two questions were raised:

1. Are the parents of the deceased, who are citizens and residents of Italy, entitled to compensation?

2. Is there sufficient testimony in the case to warrant the Board to award compensation on the ground of dependency?

The Board, in its opinion of October 20, 1921, in answer to these questions, held that the parents, under Section 310 of the Act of 1915, P. L. 736 were not entitled to compensation because they are citizens and residents of Italy; and in answer to the second question raised, held that there was sufficient testimony in the case to warrant the Board to award compensation on the ground of dependency, but that for the reason as given in the answer to the first question, the compensation was not allowed.

[fol. 36] From this decision the plaintiffs appealed to the Court of Common Pleas of Dauphin County. In an opinion by Judge John E. Fox filed on the 22nd day of March, 1922, the action of the Board was reversed as to the claimants being barred by that portion of Section 310 of the Compensation Act which reads as follows:

"Alien widowers, parents, brothers and sisters not residents of the United States shall not be entitled to any compensation."

on the ground that that portion of the statute was violative of the treaty, as amended in 1913, between the governments of Italy and

the United States, and that the claimants are entitled to recovery. Because the Board did not find any amount to which the claimants would be entitled, the record, with the aforesaid opinion of the Court, was remitted to the Workmen's Compensation Board for further hearing, if necessary, and determination in accordance therewith.

Whereupon the Board allowed a hearing de novo and made an award in favor of the claimants and against the defendants, at the rate of Two Dollars and Forty Cents ($2.40) per week from February 25th, 1916, for a period of three hundred (300) weeks, or Seven Hundred Twenty Dollars ($720.00), and in addition thereto the sum of One Hundred Dollars ($100.00) for funeral expenses of the deceased was awarded from which award the defendants appealed to the Court of Common Pleas of Dauphin County.

Judge John E. Fox on January 2nd, 1923, filed an opinion holding that portion of Section 310 of the Workmens' Compensation Act aforesaid unconstitutional, overruling the exceptions of the defendants to the decision of the Workmen's Compensation Board, and directing judgment in favor of the plaintiff and against the de-
[fol. 37] fendants in the sum of Eight Hundred Twenty Dollars ($820.00).

Defendants thereupon excepted and appealed to the Superior Court.

John C. Nissley, Attorney for Plaintiff. Beidleman & Hull, by Arthur H. Hull, Attorneys for Defendants.

[fol. 38] [File endorsement omitted.]

Feb. 7. 1923. Service accepted. John E. Fox, Judge. Beidleman & Hull, Attys.

[fols. 39 & 40] Bond on Appeal for $2,000—Approved and filed Jany. 30, 1923; omitted in printing

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[fol. 41] In Superior Court of Pennsylvania, Sitting at Harrisburg

Writ of Certiorari—Filed March 10, 1923

The Commonwealth of Pennsylvania to the Judges of the Court of Common Pleas for the County of Dauphin, Greeting:

We being willing for certain causes, to be certified of the matter of appeal of S. A. Royer and Albert Herr, trading and doing business as Royer & Herr and Travelers Insurance Company, Insurance Carrier, from the decision of said Court in the case wherein Pasquale Liberato and Anna Maria Liberato, by their Attorney-in-Fact, Gio-

vanni Di Santo, is Plaintiff and the said Appellants, Defendants, to No. 397, June Term, 1922, before you, or some of you, depending, Do Command You, that the record and proceedings aforesaid, with all things touching the same, before the Judges of our Superior Court of Pennsylvania, at a Superior Court to be holden at Harrisburg, the second Monday of next March, so full and entire as in our Court before you they remain, you certify and send, together with this Writ, that we may further cause to be done thereupon that which of right and according to the laws of the said State ought.

Witness the Honorable George B. Orlady, Doctor of Laws, President Judge of our said Superior Court, at Harrisburg, the 30th day of January in the year of our Lord one thousand nine hundred and twenty-three.

Homer Hummel Strickler, Deputy Prothonotary. (Seal.)

[fol. 42] To the Honorable the Judges of the Superior Court of the Commonwealth of Pennsylvania, sitting at Harrisburg:

The record and process, and all things touching the same, so full and entire as before us they remain, we certify and send, as within we are commanded.

John E. Fox, A. L. Judge. (L. S.)

1923, Jany. 30.—Notice of appeal accepted. John C. Nissley, Atty. pro. Plff.

Costs, $12.—Paid by Beidleman & Hull, Esqrs.

[File endorsement omitted.]

[fol. 43] In Superior Court of Pennsylvania

No. 397

Pasquale Liberato and Anna Maria Liberato, by Their Attorney-in-Fact, Giovanni De Santo, Plaintiff-,

vs.

S. A. Royer and Albert Herr, Trading and Doing Business as Royer & Herr; Travelers Insurance Company, Insurance Carrier, Defendant, Appellants.

Court of Common Pleas, County of Dauphin, June Term, 1922.

Appeal and Affidavit—Filed Jan. 30, 1923

Enter Appeal on behalf of Royer & Herr, and Travelers Insurance Co., defendant-, from the decision of the Court of Common Pleas of the County of Dauphin.

To William Pearson, Prothonotary of the Superior Court.

Beidleman & Hull, by Arthur H. Hull, Attorneys for Appellant.

County of Dauphin, ss:

Arthur H. Hull, being duly sworn saith that the above Appeal is not intended for delay, but because the Appellant believes it has suffered injustice by the decision from which it appeals.

Arthur H. Hull, Attorney for Appellant.

Sworn and subscribed this 10th day of January, A. D. 1923. C. Mabelle Dobbs, Notary Public. My Commission expires Feb. 10, 1923. (Notarial Seal.)

[fol. 44] [File endorsement omitted.]

[fol. 45] In Superior Court of Pennsylvania

[Title omitted]

[fol. 46] Assignments of Error—Filed Feb. 26, 1923

1. The learned Court below erred in its judgment overruling defendant's (appellant's) first exception to the decision of the Workmen's Compensation Board. The exception was as follows:

"The Workmen's Compensation Board erred in its second conclusion of law, which is as follows:

'The decedent met death by accident while in the course of his employment with the defendants as contemplated by the Workmen's Compensation Act of 1915, and Pasquale Liberato and Anna Maria Capon Liberato, father and mother of the decedent, were at the time of his death wholly dependent upon him for support. They are, therefore, entitled to compensation as provided by the Act.'

for the reason that Section 310 of the Workmen's Compensation Act of 1915 provides as follows:

'Alien widowers, parents, brothers and sisters not residents of the United States shall not be entitled to compensation.'

the Board in its third Finding of fact having found as follows:

[fol. 47] 'Pasquale Liberato and Anna Maria Capon Liberato, the father and mother of the decedent, had been for some time previous, and were at the time of his death, wholly dependent upon him for support, and at the time of his death were residents of Bisenti, Italy, where they still reside.'"

The judgment of the Court thereon was as follows:

"For these reasons the exceptions to the findings of the Workmen's Compensation Board are overruled, the appeal dismissed at the cost of the appellant, and the award of the Board hereby con-

firmed; judgment is hereby directed to be entered in favor of the plaintiff and against the defendant in the sum of Eight Hundred Twenty Dollars ($820.00)."

2. The learned Court erred in overruling defendant's (appellant's) third exception to the decision of the Workmen's Compensation Board. The exception was as follows:

"The Board erred in making award to the Claimants, which award is as follows:

'Compensation is accordingly awarded to the claimants, Pasquale Liberato alias Pasquale Liberati and Anna Maria Capon Liberato alias Anna Maria Capon Liberati, and against the defendants, S. A. Royer and Albert Herr, trading and doing business as Royer & Herr, and their insurance Carrier, The Travelers Insurance Company, at the rate of $2.40 per week from February 25, 1916 for a period of three hundred weeks (300), or 720.00.

There is also awarded to the claimants against the defendant its [fol. 48] Insurance Carrier the sum of $100.00 for funeral expenses of the deceased.'

for the reason that claimants being non-resident, alien parents under Section 310 of the Workmen's Compensation Act of 1915, are not entitled to compensation."

The judgment of the Court thereon was as follows:

"For these reasons the exceptions to the findings of the Workmen's Compensation Board are overruled, the appeal dismissed at the cost of the appellant, and the award of the Board hereby confirmed; judgment is hereby directed to be entered in favor of the plaintiff and against the defendant in the sum of Eight Hundred Twenty Dollars ($820.00)."

Beidleman & Hull, by Arthur H. Hull. Attys. for Appellants.

[fol. 49] [File endorsement omitted.]

[fol. 50] In Superior Court of Pennsylvania

[Title omitted.]

Opinion

Porter, J.:

The plaintiffs are the father and mother of Guiseppi Liberato, who while employed by the defendants was, on February 9, 1916, killed in the course of his employment, he died unmarried and without issue. The plaintiffs filed with the Workmen's Compensation Board a petition for compensation under the provisions of the Act of June 2, 1915, P. L. 736. The Compensation Board refused

compensation on the ground that claimants were aliens, residents of Italy, and never have resided in the United States. The Board [fol. 51] based this conclusion upon Section 310 of the Compensation Act which reads as follows: "Alien widows, parents, brothers and sisters not residents of the United States shall not be entitled to any compensation." The claimants appealed to the Court of Common Pleas of Dauphin County, which held that the above quoted provision of the Statute was invalid because in conflict with the treaty between the United States and Italy, as amended February 13, 1913, and reversed the finding of the Board and referred the case back for further action in accordance with the opinion of the court. The Board held a hearing de novo, found that the claimants were dependent upon the deceased employee and, in compliance with the decision of the Common Pleas awarded compensation, in the sum of $820.00. The defendants thereupon appealed to the court below, which court adhered to its former action and affirmed the award of the Board, from which action we have this appeal.

The only question involved is whether or not the provision of the statute, above quoted, contravenes the treaty between the United States and the Kingdom of Italy. It was decided by the Supreme Court in Maiorano vs. Baltimore & Ohio R. R. Co., 216 Pa. 402, that a non-resident alien had no standing to maintain an action under the Act of April 26, 1855, P. L. 309, for the recovery of damages for an injury to another causing death, and that this did not involve a violation of the then existing treaty between the United States and the Kingdom of Italy, which decision was affirmed by the Supreme Court of the United States: 213 U. S. 268. The material provisions of the treaty of November 18, 1871, there involved, were as follows: "Article 3. The citizens of each of the high contracting parties shall receive in the states and territories of the other the most constant protection and security for their persons and property, and [fol. 52] shall enjoy in this respect the same rights and privileges as are, or shall be, granted to the natives on their submitting themselves to the conditions imposed upon the natives." It was held in that case that when an Italian subject sojourning in this country was himself given the direct protection and security afforded by our laws to our own people, including the right of action for himself or his personal representatives to safeguard the protection and security, the treaty was fully complied with, without going further and giving to his non-resident alien relatives a right of action for damages for his death, although such action was afforded to native resident relatives. Since the decision in that case there have been changes in both the statute law of Pennsylvania and the treaty between the United States and the Kingdom of Italy. The Act of 1855 gave to the widow, parents and others dependent upon the deceased, a right of action to recover damages for his death resulting from negligence or unlawful violence, but this right did not include such parties who are non-resident aliens. The Act of June 7, 1911, P. L. 678, amending the Act of 1855, extended the right of action in such cases and conferred it upon the "husband, widow, children, or parents of the deceased, whether he, she or they be citizens or residents of the Com-

monwealth of Pennsylvania, or citizens or residents of any other state or place subject to the jurisdiction of the United States, or any foreign country, or subjects of any foreign potentate." The treaty between the United States and the Kingdom of Italy, as amended in 1913, now reads: "Article 3. The citizens of each of the high contracting parties shall receive in the states and territories of the other, the most constant security and protection for their persons and property, and for their rights including that form of protection, granted by any state or national law which establishes a civil responsibility for injuries or for death caused by negligence or fault [fol. 53] and gives to the relatives or heirs of the injured party a right of action which shall not be restricted on account of the nationality of said relatives or heirs, and shall enjoy in this respect the same rights and privileges as are, or shall be granted to nationals, provided that they submit themselves to the conditions imposed on the latter." It thus appears that so far as the right of parents, or other relatives, to recover for "death caused by negligence or fault" is concerned, the law of Pennsylvania and the treaty are in perfect harmony. These principles apply to all cases of injury or death resulting from negligence or unlawful violence, no matter what may be the relation existing between the party injured and the one responsible for the injury.

The present case is essentially distinct from an action to recover for injuries or death caused by negligence or unlawful violence. The Workmen's Compensation Act of 1915 did not take from any person the right to recover damages for injuries or death resulting from such a cause. The second section of that Act made the right more secure where the party injured was an employee of the person responsible for the injury, in that it took away from the employer certain defenses which might prior to the enactment have been effective to prevent a recovery. That statute did, however, authorize the employer and employee to agree upon an entirely different system of compensation for injuries sustained in the course of the employment, and death therefrom resulting; which compensation should in no manner be dependent upon any fault or negligence of the employer. Under this system an employee can recover for an injury for which his own negligence was entirely responsible, unless the injury or death be intentionally self-inflicted. The parties are left free to choose, there is upon them no compulsion. When, under the provisions of the statute, they contract that any injury sustained by the employee [fol. 54] in the course of his employment shall be compensated in *the* either of the ways by the law provided their rights must be determined according to the principles upon which they have agreed. The Act did not deprive either employee or employer of any right except by his own consent, conclusively presumed to have been given unless withheld in the manner prescribed by the statute. When the parties accept the provisions of Article 3 of the statute, their relations become contractual, and their rights are to be determined under the provisions of that Article; Anderson vs. Carnegie Steel Co., 255 Pa. 33. When Guiseppi Liberato accepted the provisions of Article 3 of the Workmen's Compensation Law, he covenanted that if he

should suffer an injury in the course of his employment and death therefrom resulted, his parents (these claimants) should not be entitled to compensation, if at the time of such injury they were aliens and not residents of the United States. These claimants are attempting to assert a right under the statute, but in violation of the contract by the statute authorized.

It is argued on behalf of appellees, that while the employee may waive his own right to maintain an action for injuries, he cannot bind others, not parties to the contract, and waive their right to recover damages for his death caused by negligence, and the learned court below so held. If this contention is to prevail, then it logically follows that, for the same reason neither widow, children or parents (whether resident citizens or non-resident aliens) are bound by the contract authorized by the statute, and that such surviving parties have the right to maintain an action and recover damages for death caused by negligence, notwithstanding the provisions of the Workmen's Compensation Act, precisely as they might have done under the preëxisting law. This would plainly be the equivalent of declaring to be invalid the beneficent provisions of the statute intended to protect the interests of the dependent relatives of an employee [fol. 55] who might be killed in an industrial accident for which the negligence of the employer was in no manner responsible. Such dependents would in every case be remitted to the uncertainty of an action of law for damages, with the consequent delay, in which the burden would be upon them to establish that the death was the result of the negligence of the employer. The argument is unsound and fails to take into consideration the only foundation for the right of parents to maintain an action to recover damages for the death of an adult son.

What the employee, on behalf of himself and relatives, waives by the contract is the right to recover damages, by an action at law, for his injury or death in the course of his employment resulting from the negligence of the employer. This contract he is authorized by the statute to make. What he acquires by the contract is the right to compensation under the statute for any injury which he may sustain in the course of his employment, and the certainty that, in case of his death from such injury, compensation shall be made to his dependents in the manner by the statute provided, and this to be in no manner dependent upon whether the injury or death resulted from any negligence or fault of his employer. The right of parents to recover damages for negligence resulting in the death of their adult son was statutory; Pennsylvania R. R. Co. vs. Zebe, 33 Pa. 318; Maiorano vs. B. & O. R. R. Co., 216 Pa. 407. This right had its origin in Pennsylvania in the Act of April 26, 1855; the earlier Act of April 15, 1851, having conferred the right only upon the widow, and if there was no widow, upon the personal representatives of the deceased. Article III, section 21 of the Constitution provides that in case of death from injuries the right of action shall survive "and the General Assembly shall prescribe for whose benefit such action shall be prosecuted." Parents had no property, no vested interest, in the right given by [fol. 56] statute to recover damages for negligence resulting in the

death of an adult son. That right, founded in statute, was no more sacred than any other. When the right of action had accrued, it may be, that it could not be taken away without due process; but the law itself, as rule of conduct, might be changed at the will of the legislature, unless prevented by constitutional limitation. The legislature might have repealed the Acts of April 26, 1855, P. L. 309, and June 7, 1911, P. L. 678, and limited the right to recover damages to the personal representatives of the deceased and the right of parents to recover for the death of an adult son subsequently occurring would have been at an end. This being so it was entirely competent for the legislature to enact that the employee might by contract elect to have the compensation for injuries or death sustained in the course of his employment determined in the manner by the statute provided, and that is what the Workmen's Compensation Act did. When employer and employee accept the provisions of the statute their relations become contractual, and the statutes which give to parents the right to recover damages for the death of an adult son resulting from the negligence of the employer have no application. It was expressly decided by the Supreme Court in Anderson vs. Carnegie Steel Co., supra, that the statute did not violate section 21, of Article III of the Constitution.

These plaintiffs are not seeking to recover for a death caused by negligence or fault; they are not asserting a right within the protection of the treaty between the United States and the Kingdom of Italy. In the construction of a treaty the general rule obtains that the court is to be guided by the intention of the parties, and if the words clearly express the meaning and intention no other means of interpretation can be employed: Ware vs. Hylton, 3 U. S. 199, and Maiorano vs. B. & O. R. R. Co., 216 Pa. 402. The plaintiffs seek to [fol 57] recover under a contract of their deceased son, which contract was expressly authorized by statute and under the terms of which they are denied the right to recover.

The judgment is reversed and the record remitted for further proceedings.

Opinion filed July 12, 1923—amended and refiled August 11, 1923.

Certified from the record. In testimony whereof I have hereunto set my hand and the seal of said Court at Harrisburg this 31st day of August, A. D. 1923.

Homer Hummel Strickler, Deputy Prothonotary. (Seal.)

[fol. 58] IN SUPERIOR COURT OF PENNSYLVANIA

[Title omitted]

PETITION FOR APPEAL—Filed Aug. 14, 1923

To the Honorable the Chief Justice and Justices of the Supreme Court of Pennsylvania:

The petition for appeal by Pasquale Liberato and Anna Maria Capon Liberato, by their attorney-in-fact, Giovanni De Santo, claimant, from the judgment of the Superior Court of Pennsylvania, No. 30, March Term 1923, respectfully represents:

That they are the claimants in the above case or proceeding which originated by the Workmen's Compensation Board of the Commonwealth of Pennsylvania which board denied the rights of the complainants to compensation.

That the claimants aforesaid appealed from the decision of the [fol. 59] Workmen's Compensation Board to the Court of Common Pleas of Dauphin County which was there entered to No. 397 June Term 1922.

That the Court of Common Pleas of Dauphin County found that the claimants aforesaid are the father and mother of Guiseppi Liberato, who was killed on February 9, 1916, in the quarries of Royer and Herr, defendants, in the course of his employment for said defendants.

That the plaintiffs claimants herein were dependent upon the earnings of the said Guiseppi Liberato before and at the time of his death, to whose support he regularly contributed from his earnings.

That the Court of Common Pleas of Dauphin County found that notwithstanding the Workmen's Compensation Law the claimants were entitled to compensation and based its opinion on the fact that this right was guaranteed to the said claimants by virtue of the amended treaty of 1913 between the United States and the Kingdom of Italy and thereupon reversed the Workmen's Compensation Board and returned the record for further proceedings.

Whereupon the Workmen's Compensation Board after hearing awarded compensation to the claimants as well as the sum of One Hundred ($100.00) Dollars, funeral expenses for the decedent making in all the sum of Eight Hundred Twenty ($820.00) Dollars.

Thereupon the defendants in this case appealed from the finding of the Workmen's Compensation Board to the Court of Common Pleas of Dauphin County and after argument, the Court through Judge Fox filed an opinion supporting the findings of the Workmen's Compensation Board and directed judgment to be entered in favor of plaintiffs and against the defendant in the sum of Eight Hundred Twenty ($820.00) Dollars.

Thereupon, defendants appealed to the Superior Court which

Court filed an opinion July 12, 1923, thereafter recalled and amended [fol. 60] and refiled August 11, 1923, in which it reversed the judgment and remitted the record for further proceedings, a copy of said opinion is to this petition attached, marked Exhibit "A" and made part hereof.

That the said Superior Court in its opinion by Judge Porter, inter alia states that "It thus appears that so far as the right of parents, or other relatives, to recover for 'death caused by negligence or fault' is concerned, the law of Pennsylvania and the treaty are in perfect harmony."

That the plaintiffs contend that the part of the Workmen's Compensation Law which deprives "alien widowers, parents, brothers and sisters not residents of the United States shall not be entitled to any compensation," is very much out of "harmony" and contrary and in contravention of the amended treaty of 1913 between the United States and Italy.

The Superior Court also held that the contract between the defendants herein and the deceased son of the plaintiffs deprive the alien non-residents of any compensation.

The Court from this statement of facts will see that the construction and interpretation of the amended treaty of 1913 between the United States and Italy is before the Court and the same was not passed upon by the Superior Court.

That the treaty aforesaid give to the alien non-resident parents:

(a) A right of action, which right shall not be restricted on account of the nationality of said relatives or heirs.

(b) That the clause of the Workmen's Compensation Law which says that "Alien widowers, parents, brothers and sisters not residents of the United States shall not be entitled to compensation" is contrary to the treaty as above referred to.

That the questions involved in the said case are:

(a) Whether the parents, plaintiffs, herein being non-resident [fol. 61] aliens are entitled to compensation notwithstanding the fact that they are deprived from compensation by the law above quoted?

(b) Whether the contract made by the deceased son of the plaintiffs aforesaid binds the parents so that they cannot recover compensation on account of his death notwithstanding the treaty aforesaid?

Wherefore, your petitioner prays that he be allowed to appeal from the judgment of the Superior Court to the Supreme Court of Pennsylvania and

He will ever pray, etc.

Pasquale Iiberato and Anna Maria Capon Iiberato, by Attorney-in-fact, Giovanni De Santo.

Sworn to by Giovanni De Santo. Jurat omitted in printing.

[fols. 62–69] Exhibit "A" to petition for appeal, opinion, omitted; printed side page 50, ante.

[fol. 70] August 30, 1923.

Appeal allowed and case set for argument in the Western District, during the week of October 1st, 1923.

Per Curiam: S.

John C. Nissley, Esq., Harrisburg, Pa.

[File endorsement omitted.]

[fol. 71] In Supreme Court of Pennsylvania

Writ of Certiorari—Filed Aug. 31, 1923

Middle District of Pennsylvania, ss:

The Commonwealth of Pennsylvania to the Justices of the Superior Court of Pennsylvania, Greeting:

We being willing, for certain causes, to be certified of the appeal of Pasquale Liberato and Anna Maria Liberato by their Attorney in fact, Giovanni Di Santo, from the judgment of said Court in the case wherein the said appellants are plaintiffs, and S. A. Royer and Albert Herr, trading and doing business as Royer & Herr; and Travelers Insurance Company, Insurance Carrier, Defendants, to No. 30, March Term, 1923, before you or some of you depending, do command you, that the record and proceedings aforesaid, with all things touching the same, before the Justices of our Supreme Court, at a Supreme Court to be holden at Harrisburg, in and for the Middle District of said Commonwealth, on the first Monday of October of the year, 1923, so full and entire as in our Court before you they remain, you certify and send together with this writ; that we may further cause to be done thereupon, what of right and according to our laws of the said State ought.

Witness, The Honorable Robert von Moschzisker, Doctor of Laws, Chief Justice of our Supreme Court, at Harrisburg, the 31st day of August, in the year of our Lord, one thousand nine hundred and twenty-three, and of the Commonwealth the 147th.

Homer Hummel Strickler, Deputy Prothonotary. (Seal.)

[fol. 72] The Record and process, with all things touching the same, so full and entire as before us, they remain to the Honorable the Judges of the Supreme Court of the Commonwealth of Pennsylvania, sitting in and for the Middle District, we certify and send as within we are commanded.

Geo. B. Orlady, P. J. (L. S.)

[File endorsement omitted.]

[fol. 73] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

DOCKET ENTRIES—Sept. 1, 1923

Aug. 14, 1923.—Petition for allowance of appeal filed.
August 30, 1923.—Appeal allowed and case set for argument in the Western District during the week of October 1st, 1923. Per Curiam. S.
Aug. 31, 1923.—Exit writ rtble. 1st Monday of October, 1923.
Aug. 31, 1923.—Record filed.

John C. Nissley, Esq., Harrisburg, Pa., for Appellants.
E. E. Beidleman, Esq., Harrisburg, Pa., for Appellees.
Arthur H. Hull, Esq., Harrisburg, Pa., Appellees.

True copy from the record.
In testimony whereof, I have hereunto set my hand and the seal of said Court, at Harrisburg this 31st day of August, A. D. 1923.
Homer Hummel Strickler, Deputy Prothonotary. (Seal.)

[fol. 74] [File endorsement omitted.]

[fol. 75] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

MOTION TO CONTINUE CAUSE—Filed Sept. 8, 1923

To the Honorable the Chief Justice and Justices of said Court:

That in the above case an appeal was allowed on petition of the plaintiff from the opinion of the Superior Court of Pennsylvania, and in said order of the Supreme Court allowing said appeal, the time for argument was fixed for the week of October 1st, 1923, in Pittsburgh. That plaintiffs by their attorney, John C. Nissley, respectfully now move the Court to continue said case to be heard at the next sitting of the Court in the Middle District of Pennsylvania at Harrisburg, the week of May 26, 1924 and assign as a reason for said motion that, plaintiffs are very poor and cannot afford to pay counsel the necessary expenses incident to the journey to Pittsburgh, and that counsel cannot bear his personal expenses and lose the time necessary for attendance at Court in the city named in said order.
John C. Nissley, Atty. for Plaintiffs.

[fol. 76] Sworn to by John C. Nissley. Jurat omitted in printing.

Harrisburg, Pa., September 8th, 1923.

I, the undersigned, counsel for defendants in the above stated case hereby join in the above motion and am satisfied and also respectfully request the Court to grant the said motion.

Beidleman & Hull, by Arthur H. Hull.

[fol. 77] 1923, Sept. 12.

Prayer of petition granted. Place on list mentioned within.

R. von. M., C. J.

[File endorsement omitted.]

[fol. 78] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

ASSIGNMENTS OF ERROR—Filed May 21, 1924

I hereby certify that following are the assignments of error:

1. The Superior Court erred in finding that "These plaintiffs * * * are not asserting a right within the protection of the treaty between the United States and the Kingdom of Italy."

2. The Superior Court erred in finding that "That the plaintiffs seek to recover under the contract of their deceased son, which contract was expressly authorized by statute and under the terms of which they are denied the right to recover."

3. The Superior Court erred in reversing the judgment of the Court of Common Pleas as follows:

"The judgment is reversed and the record remitted for further proceedings."

Paul A. Kunkel, Counsel for Appellants.

[fol. 79] [File endorsement omitted.]

[fol. 80] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

OPINION

Per CURIAM:

The judgment appealed from is affirmed on the opinion of the Superior Court, reported in 81 Pa. Superior Ct. 403.

[fol. 81] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

Appeal from the Judgement of the Superior Court Reversing the Court of Common Pleas of Dauphin County

Argued May 26, 1924

JUDGMENT—Filed July 8, 1924

Judgment affirmed.

Per Curiam. M.

[File endorsement omitted.]

[fol. 82] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

PETITION TO HOLD RECORD AND ORDER THEREON—Filed July 18, 1924

To the Honorable the Chief Justice and Justices of said Court:

The petition of Pasquale Liberato and Anna Maria Capon Liberato, by their Attorney-in-fact, Giovanni Di Santo, Appellants, in the above-entitled case respectfully represents

That one of their attorneys, John C. Nissley, Esq., recently died, and that their other attorney, Paul A. Kunkel, Esq., is out of the city on business;

That the questions involved in the above-entitled case are so important that they desire to apply for a Writ of Error to the Supreme Court of the United States;

That the time limit, as provided by the Rules for holding the record in the above case expires to-day.

Wherefore your Petitioners respectfully pray that your Honorable Court issue an order to the Prothonotary of the Middle District to hold the record in the above case until they can apply for a Writ of Error.

And they will ever pray, etc.

Pasquale Liberato and Anna Maria Capone Liberato, by their Attorney-in-fact, Giovanni Di Santo, Appellants.

[fol. 83] Sworn to by Giovanni Di Santo. Jurat omitted in printing.

Order

And now, this 21st day of July, A. D. 1924, upon consideration of the foregoing petition and upon the representation that the above

appellants will present to the Supreme Court of the United States petition in the above entitled case for a Writ of Error therein, it is

Ordered that the record in the above-entitled case be held by the Prothonotary of this Court and be not remitted to the Court of Common Pleas of Dauphin County until the expiration of thirty days from the date hereof.

Simpson, Justice.

[fol. 84] [File endorsement omitted.]

[fol. 85] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

PETITION FOR REARGUMENT—Filed Aug. 13, 1924

To the Honorable the Justices of the Supreme Court of Pennsylvania:

Your petitioners respectfully set forth:

1. That they are the above named plaintiffs.

2. That your Honorable Court affirmed the judgment of the Superior Court on the 8th day of July, 1924, and on the 21st day of July ordered that the record be held by the Prothonotary and not remitted to the lower court for thirty days in order that your petitioners might have the opportunity of presenting to the Supreme Court of the United States a petition for a writ of error.

3. Rule 86 of your Honorable Court states that "such petition must be accompanied by a motion for re-argument."

Wherefore your petitioners hereby respectfully move for a re-argument in the above stated case.

And your petitioners will ever pray.

Paul A. Kunkel, Atty. for Petitioners.

[fol. 86] Sworn to by Giovanni Di Santo. Jurat omitted in printing.

[fol. 87] Petition for re-argument refused Sept. 22, '24.

Per Curiam.

[File endorsement omitted.]

[fol. 88] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

PETITION FOR APPEAL—Filed Aug. 13, 1924

To the Honorable the Justices of the Supreme Court of Pennsylvania:

The petition of the above named plaintiffs, Pasquale Liberato and Anna Maria Capon Liberato, by their Attorney-in-fact, Giovanni Di Santo, respectfully sets forth:

1. That they are the appellants and the plaintiffs in the above stated case, which case had been decided in favor of the plaintiffs in the court below and upon appeal to the Superior Court the judgment of the court below was reversed, and upon appeal therefrom to the Supreme Court of Pennsylvania, the Supreme Court affirmed the judgment of the Superior Court July 8, 1924, in the following brief per curiam:

"The judgment appealed from is affirmed on the opinion of the Superior Court, reported in 81 Pa. Superior Court 403."

(See also Exhibit "A.")

2. Your petitioners, the said plaintiffs, desire to appeal to the Supreme Court of the United States from the said judgment of the Supreme Court of Pennsylvania.

[fol. 89] 3. The treaty between the United States of America and the Kingdom of Italy, which is in question, is set forth in the paper book herewith presented and made part of this petition, which book is entitled, "Brief for appellant and record", which was used in the argument before the Supreme Court of Pennsylvania. The "Brief for the appellee", is herewith also presented. (Paper book).

4. The Statute of the State of Pennsylvania which is in question on the ground of its being repugnant to the Constitution and the said Treaty of the United States, is also set forth specifically in said paper books.

5. The statement of the questions involved (see Appellants' book, page 1), clearly shows a constitutional question, viz: (quoting):

"1. Is not that section 310 of the Workmen's Compensation Act of 1915, P. L. 736, which reads as follows: 'Alien widowers, parents, brothers and sisters not residents of the United States shall not be entitled to compensation,' unconstitutional because it contravenes the treaty between the United States and Italy proclaimed November 23d, 1871 (17 Stat. 845) as amended February 25th, 1913, which reads as follows: 'The citizens of each of the high contracting parties shall receive in the states and territories of the other the most constant security and protection for their persons and property and for their rights, including that form of protection granted by any state or national law which establishes a civil responsibility for injuries or

for death caused by negligence or fault and gives to relatives or heirs of the injured party a right of action, which right shall not be restricted on account of the nationality of said relatives or heirs, and shall enjoy in this respect the same rights and privileges as are, or [fol. 90] shall be granted to nationals, provided that they submit themselves to the conditions imposed on the latter.' "

2. Did not the treaty delete that part of Section 310, excepting alien non-resident parents, so that the contract of employment could not and did not contain that provision."

Wherefore your petitioners respectfully pray your Honorable Court for the allowance of a writ of error to review the above recited judgment of the Supreme Court of Pennsylvania.

And your petitioners will ever pray.

Paul A. Kunkel, Attorney for Petitioners.

Sworn to by Giovanni Di Santo. Jurat omitted in printing.

[fol. 91] Exhibit "A" to petition for appeal, opinion, omitted; printed S. O. Page 80.

[fols. 92 & 93] In Supreme Court of Pennsylvania

Clerk's Certificate

I, Homer Hummel Strickler, Deputy Prothonotary of the Supreme Court of Pennsylvania, in and for the Middle District thereof, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct Copy of the whole and entire opinion in the case of Liberato et ux. etc. vs. Royer et al., at No. 6 of May Term, 1924, as full, entire and complete as the same remains on file in the said Supreme Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record, and of the whole of the original thereof.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court at Harrisburg, in the County of Dauphin, in the said Middle District of Pennsylvania, this 13th day of August in the year of our Lord One Thousand Nine Hundred and Twenty-Four.

Homer Hummel Strickler, Deputy Prothonotary. [seal.]

[fol. 94] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

ORDER ALLOWING APPEAL

Petition for allowance of appeal, granted Sept. 22, 1924.

R. von M., C. J.

[File endorsement omitted.]

[fol. 95] IN SUPREME COURT OF PENNSY-VANIA

[Title omitted]

NOTICE OF APPEAL—Filed Aug. 13, 1924

I hereby certify that I have this day served personnally on Beidleman & Hull, Esqs., counsel for the above named Appellees copies of the petitions for re-argument and for the allowance of an appeal to the Supreme Court of the United States, by handing them true and attested copies thereof.

Paul A. Kunkel, Counsel for the Above-named Appellants.

August 13, 1924.

Service accepted.

Beidleman & Hull, Attys. for Defts.

[fol. 96] [File endorsement omitted.]

[fol. 97] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD—Filed Oct. 16, 1924

Counsel for the above parties hereby agree that the transcript shall consist of the statement of the case, the statement of questions involved, quoting the material parts of the Treaty in question, the first and second opinions of the Court below, the opinion of the Superior Court and also of the Supreme Court of Pennsylvania, and also all the papers filed in the Superior and Supreme Courts of Pennsylvania.

Paul A. Kunkel, Council for Plaintiff. Beidleman & Hull, Counsel for Defendant.

[fol. 98] [File endorsement omitted.]

[fols. 99-101] BOND ON WRIT OF ERROR FOR $500—Approved and filed Oct. 16, 1924; omitted in printing

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[fol. 102] IN SUPREME COURT OF PENNSYLVANIA

[Title omitted]

ASSIGNMENTS OF ERROR—Filed Oct. 1, 1924

1. The Supreme Court of Pennsylvania erred in finding that "These plaintiffs * * * are not asserting a right within the proctection of the treaty between the United States and the Kingdom of Italy."

2. The Supreme Court of Pennsylvania erred in finding "That the plaintiffs seek to recover under the contract of their deceased son, which contract was expressly authorized by statute and under the terms of which they are denied the rgiht to recover."

3. The Supreme Court of Pennsylvania erre*r* in affirming the judgment of the Supreme Court of Pennsylvania as follows: "The judgment appealed from is affirmed on the opinion of the Superior Court, reported in 81 Pennsylvania Superior Court 403."

Paul A. Kunkel, Counsel for Appellants.

[fol. 103] [File endorsement omitted.]

[fol. 104] IN SUPREME COURT OF PENNSYLVANIA

RETURN TO WRIT OF ERROR

And now to wit, October 22, 1924, the said Pasquale Liberato and Anna Maria Capon Liberato, by their Attorney-in-Fact, Giovanni Di Santo, having produced to the Supreme Court of Pennsylvania for the Middle District, the Writ of the United States of America for the correcting of errors of and upon the said premises and commanding the record and proceedings aforesaid, of the judgment aforesaid so as aforesaid rendered with all things touching the same, to be transmitted to the Supreme Court of the United States to be held at the city of Washington within thirty days from the date of the writ, to-wit, September 30, 1924, which Writ of Error is hereunto annexed, in pursuance whereof, and according to the form and effect of the Act of Congress in such case made and provided, a transcript of the record and proceedings of the judgment aforesaid as per stipulation of counsel filed so as aforesaid rendered, with all things relating to the same, together with the said Writ of Error, are hereby transmitted to the Supreme Court of the United States accordingly.

[fol. 105] In testimony that the foregoing, contained on page 1 to 114 is a duly certified transcript of the complete record and other papers before the Superior and Supreme Courts of Pennsylvania, as per stipulation of counsel filed in the within entitled case wherein Pasquale Liberato and Anna Maria Capon Liberato, by their Attorney-in-fact, Giovanni Di Santo, were plaintiffs below and S. A. Royer and Albert Herr, Trading and doing business as Royer & Herr; and travelers Insurance Company, Insurance Carrier, were defedendants below, with all things concerning the same, I have hereunto subscribe my name and affix the seal of the said Supreme Court of Pennsylvania for the Middle District, at Harrisburg the day and year just above written.

William Pearson, Prothonotary of the Supreme Court of Pennsylvania for the Middle District. (Seal of the Supreme Court of Pennsylvania, Middle District.)

[fol. 106] In Supreme Court of Pennsylvania

Clerk's Certificate

I, William Pearson, Prothonotary of the Supreme Court of Pennsylvania, in and for the Middle District thereof, the said Court being a Court of Record, do hereby certify that the foregoing is a true and correct Copy of the whole and entire Record and other papers before the Superior and Supreme Courts of Pennsylvania, as per stipulation of counsel filed in the case of Pasquale Liberato and Anna Maria Capon Liberato, by their Attorney-in-Fact, Giovanni Di Santo, Plaintiffs, vs. S. A. Royer and Albert Herr, Trading and doing business as Royer & Herr; and Travelers Insurance Company, Insurance Carrier, Defendants, at No. 6, May Term, 1924, as full, entire and complete as the same re*a*mins on file in the said Supreme Court, in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record, and of the whole of the original thereof, as per stipulation of counsel filed.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court at Harrisburg, in the County of Dauphin, in the said Middle District of Pennsylvania, this 22-d day of October in the year of our Lord One Thousand Nine Hundred and Twenty-four.

William Pearson, Prothonotary. (Seal of the Supreme Court of Pennsylvania, Middle District.)

[fol. 107] IN SUPREME COURT OF PENNSYLVANIA

JUDGE'S CERTIFICATE TO CLERK

I, Robt. von Moschzisker, Chief Justice of the Supreme Court of Pennsylvania, being the highest court of law or equity of the said State, do certify that William Pearson by whom the annexed record, certificate and attestation were made and given, and who, in his own proper handwriting, thereunto subscribed his name and affixed the seal of the Supreme Court of Pennsylvania, was at the time of so doing and now is Prothonotary in and for the Middle District of said Court, duly commissioned and qualified; to all of whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere, and that the said record, certificate and attestation are in due form of law and made by the proper officer.

R. von Moschzisker, Chief Justice of the Supreme Court of Pennsylvania. (Seal of the Supreme Court of Pennsylvania, Middle District.)

[fol. 108] IN SUPREME COURT OF PENNSYLVANIA

CLERK'S CERTIFICATE TO JUDGE

I, William Pearson, Prothonotary of the Supreme Court of Pennsylvania, in and for the Middle District thereof, do certify that the Honorable Robt. von Moschzisker, by whom the foregoing attestation was made, and who has thereunto subscribed his name, was at the time of making thereof and still is Chief Justice of the Supreme Court of Pennsylvania, duly commissioned and qualified; to all of whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 22d day of October, A. D. 1924.

William Pearson, Prothonotary. (Seal of the Supreme Court of Pennsylvania, Middle District.)

[Title omitted.]

[fols. 109 & 110] Writ of Error—Omitted; printed side page 2 ante.

[fols. 111 & 112] Citation—In usual form, showing service on Beidleman & Hull; filed Oct. 1, 1924; omitted in printing.

[fol. 113] In Supreme Court of Pennsylvania

Assignments of Error—Filed Oct. 1, 1924.

1. The Supreme Court of Pennsylvania erred in finding that "These plaintiffs * * * are not asserting a right within the protection of the treaty between the United States and the Kingdom of Italy."

2. The Supreme Court of Pennsylvania erred in finding "That the plaintiffs seek to recover under the contract of their deceased son, which contract was expressly authorized by statute and under the terms of which they are denied the right to recover."

3. The Supreme Court of Pennsylvania erred in affirming the judgment of the Supreme Court of Pennsylvania as follows: "The judgment appealed from is affirmed on the opinion of the Superior Court, reported in 81 Pennsylvania Superior Court 403."

Paul A. Kunkel, Counsel or Appellants.

[fol. 113½] In Supreme Court of Pennsylvania

Clerk's Certificate

I, William Pearson, Prothonotary of the Supreme Court of Pennsylvania, in and for the Middle District thereof, the said Court being a Court of Record, do hereby that the foregoing is a true and correct Copy of the whole and entire Record, and other papers before the Superior and Supreme Courts of Pennsylvania, as per stipulation of counsel filed, in the case of Pasquale Liberato and Anna Maria Capon Liberato, by their Attorney-in-Fact, Giovanni Di Santo, Plaintiffs, vs. S. A. Royer and Albert Herr, Trading and doing business as Royer & Herr; and Travelers Insurance Company, Insurance Carrier, Defendants, at No. 6, May Term, 1924, as full, entire and complete as the same remains on file in the said Supreme Court in the case there stated; and I do hereby further certify that the foregoing has been compared by me with the original record in said cause in my keeping and custody as the Prothonotary of said Court, and that the foregoing is a correct transcript from said record, and of the whole of the original thereof, as stipulated by counsel.

In testimony whereof, I have hereunto set my hand and affixed

the seal of the said Court at Harrisburg in the County of Dauphin, in the said Middle District of Pennsylvania, this — day of October in the year of our Lord One Thousand Nine Hundred and Twenty-four.

William Pearson, Prothonotary. (Seal of the Supreme Court of Pennsylvania, Middle District.)

[fol. 114] [File Endorsement Omitted.]

Endorsed on cover: File No. 30,715. Pennsylvania Supreme Court. Term No. 214. Pasquale Liberato and Anna Capon Liberato, by their attorney-in-fact, Giovanni Disanto, plaintiffs in error, vs. S. A. Royer & Albert Herr, trading and doing business as Royer and Herr, et al. Filed December 1st, 1924. File No. 30,715.

In the Supreme Court of the United States

October Term, 1926

No. 214

PASQUALE LIBERATO AND ASUNTA CAPUTO LIBERATO,
By Their Attorney-in-fact Giovanni Di Guido,
Plaintiffs in Error,

vs.

S. A. ROYER & ALBERT ROYER, Trading and Doing Business as Royer and Herr, et al.

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA

BRIEF FOR THE PLAINTIFFS IN ERROR

PAUL A. KUNKEL,
GEORGE ROSS HULL,
WILLIAM HARRIS NISSLY,
Attorneys for Plaintiffs in Error,
Harrisburg, Penna.

INDEX

AUTHORITIES

Cases:

I N D E X—Continued.

In the Supreme Court of the United States

OCTOBER TERM, 1925

PASQUALE LIBERATO AND
ANNA CAPON LIBERATO by Their Attorney-in-Fact, Giovanni Di Santo,
Plaintiffs in Error.

vs.

S. A. ROYER AND ALBERT HERR,
Trading and Doing Business as
Royer and Herr, et al.

No. 214

IN ERROR TO THE SUPREME COURT OF THE STATE OF PENNSYLVANIA.

BRIEF FOR THE PLAINTIFFS IN ERROR

Reference to the Opinions in the Courts Below

The first opinion in this case was written by Judge John E. Fox in the Court of Common Pleas of Dauphin County, Pennsylvania, on March 22nd, 1922 and is reported in Dauphin County Reporter, Volume 25, page 192.

A second Opinion was handed down by the same Judge and in the same Court on January 2nd, 1923 and is reported in Dauphin County Reporter, Volume 26, page 39.

On July 12th, 1923, Mr. Justice Porter delivered

the Opinion of the Superior Court of Pennsylvania, which is reported in 81 Pa. Super. 403 (R 20).

On July 8th, 1924 the Supreme Court of Pennsylvania delivered a per curiam Opinion, which is reported in 281 Penna. St. 227 (R30).

Grounds on Which the Jurisdiction of This Court is Invoked

The judgment of the Supreme Court of Pennsylvania was rendered on the strength of the Opinion of the Superior Court (R29) which Court in interpreting the amended Treaty with Italy granting Italian non-residents equality of treatment and especially with regard to "that form of protection granted by any State or National law which establishes a civil responsibility for injuries or for death caused by negligence or fault, etc.," held that the Treaty only intended to give protection in case of death by negligence or fault (R22); that in bringing an action under the Pennsylvania Workmen's Compensation Act an Italian nonresident is not asserting a right under the protection of the Treaty since he does not bring an action for death caused by negligence or fault, the Court saying: "These plaintiffs are not seeking to recover for death caused by negligence or fault; they are not asserting a right within the protection of the Treaty between the United States and the Kingdom of Italy" (R24).

The jurisdiction of this Court is invoked by virtue of Section 237 of the Judicial Code as amended by Act of Dec. 23rd, 1914, C. 2 and the Act of Sept.

6th, 1916, C. 448 (U. S. Compiled Statutes page 1580).

The following cases sustain the jurisdiction of the Court in this case:

Maiorano vs. Baltimore & Ohio Ry. Co., 213 U. S. 268.

Lynham vs. Hauenstein, 100 U. S. 483.

Rogers vs. Hennepin County, 240, U. S. 184.

North Carolina Ry. Co. vs. Zachary, 232 U. S. 248 (257).

Miedreich vs. Lauenstein, 232 U. S. 236.

Carlson vs. Washington, 234 U. S. 103.

Southern Pacific Co. vs. Schuyler, 227 U. S. 601 (611).

Madera Sugar Co. vs. Industrial Accident Commission, 262 U. S. 499.

STATEMENT OF CASE.

The plaintiffs in error are residents and subjects of Italy and were the dependent father and mother of Giuseppi Liberato, who was killed on February 9th, 1916 at Swatara Station, Dauphin County, Pennsylvania in the course of his employment with the defendants in error, and who at the time of his death was unmarried and without issue (R. 15). The said plaintiffs in error sought to recover compensation under the terms of the Pennsylvania Workmen's Compensation Act (the Act is set forth in full in the Appendix, page), which provides in Section 307, inter alia, that in case of death and there should be neither widow, widower, or children compensation should be payable to the father or mother. The defendants in error resisted the payment of compensation on account of Section 310 which provides that "Alien widowers, parents,

brothers and sisters, not residents of the United States, shall not be entitled to any compensation."

The Court of Common Pleas of Dauphin County held that plaintiffs in error were entitled to compensation and entered judgment in the sum of $820.00, the amount due (R. 15). The Court held that the above quoted portion of Section 310 was inoperative and void since it violated the Treaty of 1913 with Italy, which Treaty guarantees Italian citizens equal rights with United States citizens regardless of their place of residence, and therefore the legislature of Pennsylvania had no right to put a disqualification on Italian citizens on account of non-residence. The Superior Court of Pennsylvania reversed the above judgment, holding that the plaintiffs were not within the protection of the terms of the Treaty, saying that the Treaty was only intended to give a right of action where there was a death due to negligence and that an action under the Workmen's Compensation Act was not an action for death due to negligence as contemplated by the Treaty. The Supreme Court ot Pennsylvania sustained the judgment of the Superior Court, wherefore this writ of error was sued out.

Specification of Assigned Errors Which Are Intended to Be Urged.

1. The Supreme Court of Pennsylvania erred in finding that "These plaintiffs are not asserting a right within the protection of the treaty between the United States and the Kingdom of Italy." (R. 35).
2. The Supreme Court of Pennsylvania erred in finding "That the plaintiffs seek

to recover under the contract of their deceased son, which contract was expressly authorized by statute and under the terms of which they are denied the right to recover."

3. The Supreme Court of Pennsylvania erred in affirming the judgment of the Superior Court of Pennsylvania as follows: "The judgment appealed from is affirmed on the Opinion of the Superior Court reported in 81 Pennsylvania Superior Court 403."

ARGUMENT.

Summary of Argument.

It is the contention of the plaintiffs in error that the Pennsylvania Workmen's Compensation Act grants to dependent parents who are citizens or residents of this country a right of action on account of the death of their children where the injury causing that death was sustained by the children in the course of their employment, but that the Act withholds this right from non-resident alien parents. The Treaty with Italy stipulates that non-resident aliens of that country shall have equal rights with citizens of this country, especially with regard to any form of protection which establishes a civil responsibility for injuries. In granting the right aforesaid to citizens or residents of this country and withholding that right from Italian non-residents, the Act is in contravention of the Treaty and is void and inoperative as to Italain non-residents. Hence the plaintiffs in error who are Italian non-residents are entitled to compensation, and the judgment of

the Supreme Court of Pennsylvania refusing them compensation should be reversed.

Under the Constitution of Pennsylvania an independent right of action survives on account of injuries resulting in death.

Under the Constitution of Pennsylvania where there is a death resulting from injuries a right of action survives to such persons as shall be designated by the legislature. This is a wholly new and independent right, not a right cast upon the parties as for injury done the decedent, but is a right sustained by them as individuals and is a distinct and separate property right in them.

The common law maxim actio personalis moritur cum persona was first abrogated in Pennsylvania by the Act of April 15th, 1851, Penna. Pamph. Laws 674, which granted a right of action to the widow, husband, children or parents in case of death by unlawful violence,and where there were no such relatives then to the personal representatives. The Act of April 26th, 1855, Penna. Pamph. Laws 309 amended the preceding statute and provided that the persons entitled to recover damages on account of injury resulting in death should be the "husband, widow, children or parents of the deceased and no other relative." In 1874 the rights granted by the previous statutes were incorporated into the fundamental law of the State. Article Three, Section Twenty-one of the Pennsylvania Constitution stipulates that a right of action for death by injury shall survive and the General Assembly shall prescribe for whose benefit such action shall be prosecuted. By the Act of June 7th, 1911 Penna. Pamph. Laws 678 the Act of 1855, supra, was amended and a

right of action in such cases conferred on the persons named in the preceding Act whether residents or non-residents of this country.

It has been held by the highest courts of the State of Pennsylvania that the Constitutional provision above referred to and the various legislative enactments thereunder created a new and indepndent property right in the persons designated by the legislature. The survivors had a right to sue and recover damages, the damages being computed on the basis of the pecuniary value to them of the life which was lost. They did not acquire their right of action through the deceased in any way, said right being wholly independent of any right existing in the deceased at the time of his death. The deceased had nothing that he could pass on so far as any right of action was concerned. The right of action on account of his injury ceased with his death. The legislature then invested certain of his relatives with a new right, which is a separate property right in the persons to whom it was given. The matter is well put in the case of Maiorano vs. Baltimore & Ohio Ry. Co., 216 Penna. St. 402 (407) where the court inter alia, said:

> "At common law the death of a human being could not be complained of as an injury in a civil court, and therefore could not be made the ground of an action for damages. While the statute allows such action at the suit of the husband, widow, children or parents, the action is not for the enforcement of any right which was in the party killed, but for a wholly distinct cause not affecting in any way the estate or rights of such party; it is exclusively for such damages as the parties plaintiff in the action have sustained

> by reason of the death. As was said in Pennsylvania Ry. Co. vs. Zebe, 33 Pa. 318, this latter is a new and independent right given by positive law, not cast upon the parties to whom the statute gives it by survivorship as for injury done the decedent, but is for a wrong done to them as individuals. The measure of damages allowed in such cases is but another expression of the same truth; the damages are limited to the pecuniary value of the life to those who sue, indicating clearly that the right to sue is not as though it came by succession as the right to recover what belonged to the party killed, but an independent cause of action for damages sustained by those who are allowed to bring the action."

In Haggarty vs. Pittston, 17 Pa. Super. 151 (154) the court had this to say:

> "The law treats the value of the life lost as a species of property which in the present instance vested in the father."

And in Books Admr. vs. Borough of Danville, 95 Penna. St. 158 (166) we find this language:

> "In the case of Mann vs. Wieand, 4 W. N C. 6 we held that the right of action for damages from death by negligence never existed in the deceased; that it was given to and first existed in the widow."

> This is the well recognized rule in Pennsylvania; North Penna. Ry. Co. vs. Robinson et al, 44 Penna. St. 175; Moe vs. Smiley, 125 Penna. St. 136; Birch et al vs. Pittsburgh, Cincinnatti, Chicago & St. Louis Ry. Co. 165 Penna. St. 339; Mayer Admr. vs. Phila. Traction Co., 181 Penna. St. 391. This is in conformity with the rule in other jurisdictions: Michigan Ry Co. vs. Vreeland, 227 U. S. 59;

Blake vs. Midland 18 Q. B. (Eng) 93; Seward vs. The Vera Cruz, 10 App. Cas. (Eng) 59.

Pennsylvania Workmen's Compensation Act was enacted in pursuance of the foregoing Constitutional provision, and is amendatory of the previous statutes granting a right of action for injuries resulting in death.

The Workmen's Compensation Act is the last statutory expression of the legislature regarding the right to recover the damage suffered through injury resulting in death. It is an amendment to the previous acts fundamentally changing the rights of relatives and dependents of a person killed in the course of a given employment, and like the previous statutes must be considered as vesting in the relatives of the deceased employee a new and independent property right, which the said relatives do not take by way of succession through the employee, but which first exists in themselves as a separate right. While the Appellate Courts of Pennsylvania have not put a definition on the character of the rights acquired by the said dependent relatives, it is submitted that no other interpretation is open to our Courts in view of the provisions of Article Three Section Twenty-One of the Pennsylvania Constitution. The Act is in pari materia with the above provision and must be construed in the light of the construction placed on that provision, which is that the action is a new and independent right in those to

whom it is given. In Endlich on "Interpretation of Statutes" at page 248 it is said:

> "It has already been said that a statute must be construed together with a constitutional provision in pari materia. No departure from the Constitution can be assumed to be intended by the legislature. Hence the meaning of the language used in a statute must be understood to conform with, and be construed with reference to, the intention expressed upon the same subject matter by the Constitution; and the provissions of the statute must be understood, on the one hand as silently embracing those prescribed before or after its passage by the Constitution, or on the other hand stopping short of that for which the latter has made other provision." Also see Grenada Co. vs. Brogden, 112 U. S. 261; Banger's Appeal, 109 Penna. St. 79; Newland vs. Marsh, 19 Ill. 376 (384); Marshall vs. Grimes, 41 Miss. 27 (31); Cooley on "Constitutional Law" page 184.

Treaty between United States and Italy guarantees to Italian Citizens, whether residents or non-residents of this country, equal rights with United States Citizens.

Article Three of the treaty of 1871, (17 Stat. 845) reads as follows:

> "The citizens of each of the high contracting parties shall receive in the states and territories of the other the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are, or shall be, granted to the

Article Three, Section Twenty-one of the Pennsylvania Constitution was amended on November 2nd, 1915, the same year the Workmen's Compensation Act was passed, expressly giving the Legislature the right to fix a limit on the amount of compensation due as the result of injuries resulting in death. The Amendment may be found in 5 Purdon's Digest, page 5205, reading as follows:

IV. AMENDMENTS OF 1915
ARTICLE III.
Section XXI.

21. The general assembly may enact laws requiring the payment by employer, or employers and employees jointly, of reasonable compensation for injuries to employees arising in the course of their employment, and for occupational diseases of employees, whether or not such injuries or diseases result in death, and regardless of fault of employer or employee, and fixing the basis of ascertainment of such compensation and the maximum and minimum limits thereof, and providing special or general remedies for the collection thereof; but in no other cases shall the general assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property, and in case of death, from such injuries, the right of action shall survive, and the general assembly shall prescribe for whose benefit such action shall be prosecuted. No act shall prescribe any limitations of time within which suits may be brought against corporations for injuries to persons or property, or for other causes, different from those fixed by general laws regulating actions against natural persons, and such acts now existing are avoided.

natives on their submitting themselves to the conditions imposed upon the natives."

Article One of the treaty as amended in 1913, (38 Stat. (1669) reads as follows:

> "The citizens of each of the high contracting parties shall receive in the states and territories of the other the most constant protection and security for their persons and property, and for their rights including that form of protection, granted by any state or national law, which establishes a civil responsibility for injuries or for death caused by negligence or fault and gives to the relatives or heirs of the injured party a right of action, which shall not be restricted on account of the nationality of the said relatives or heirs, and shall enjoy in this respect the same rights and privileges as are, or shall be, granted to the natives on their submitting themselves to the conditions imposed upon the natives."

The new language of the amended treaty was intended by the high contracting parties to give to citizens of Italy who are not residents of the United States the same rights and privileges and the same protection as are enjoyed by citizens of the United States. Especially was this language intended to give to such Italian citizens the same rights and protection in cases where there should be injury resulting in death, this right having been denied previously to Italian non-residents in the case of Maiorano vs. Baltimore & Ohio Railroad Co. 213 U. S. 268. In the Maiorano case an Italian woman who was a citizen and resident of Italy sought to recover damages under the Pennsylvania Act of 1855, supra, on account of the death of her husband who was a resident of Pennsylvania at the time of his acci-

dental death at the hands of the defendant in that case. The Supreme Court of Pennsylvania, relying on the case of Deni vs. Pennsylvania Railroad Co., 181 Pa. St. 525, in which the court previously held that the above act did not apply to non-resident aliens, decided that the plaintiff could not recover. The court reasoned that non-resident aliens had no inherent right of action for injury resulting in death; that the legislature could have invested them with that right if it had chosen to do so; but that from the phraseology of the act it could not be gathered that the legislature intended to confer that right on said non-resident aliens; that the plaintiff being a non-resident alien and having been given no right of action by the legislature could not maintain her suit. The treaty of 1871, supra, was invoked by the plaintiff to distinguish her case from the Deni case. The plaintiff argued that the treaty granted to Italian citizens the same protection for their persons and property as should be enjoyed by citizens of the United States, and that since the right to sue for injuries causing death is a property right, the treaty guaranteed that right to Italians when given to citizens of the United States; that it was discriminatory to grant such a right to United States citizens and withhold the same from Italian non-residents. The Pennsylvania court held, however, and their judgment was upheld in this court, that the treaty was intended only to apply where either the persons or the property of Italian citizens were actually within the jurisdiction of the United States and that it was not the intention of the treaty to grant to non-resident Italians the same rights as United States citizens should enjoy, and hence the Pennsylvania

act withholding the right from non-resident aliens did not transgress the treaty.

The doctrine of the Maiorano case was rejected in this court in McGovern vs. Philadelphia & Reading Railway Co., 235 U. S. 291, where this court construed the Federal Employers' Liability Act as applying to non-resident aliens. The lower court, 209 Fed. 975, relied on the Deni case and the Maiorano case and held that non-resident aliens were precluded from bringing an action on acount of accidental death. This court, however, expressly refused to follow the reasoning of the lower court and held that non-resident aliens were allowed to recover under the act. The effect of this court's decision in the McGovern case is to limit very much the doctrine of the Maiorano case, the court saying that they were simply accepting the Pennsylvania court's construction of the act in question. Thus Mr. Justice McKenna had this to say with regard to the decision of the Maiorano case (page 398):

> "In ruling upon the statute the District court considered the reasoning in Deni vs. Pennsylvania Railroad Co., 181 Pa. 525, and Maiorano vs. Baltimore & Ohio Railroad Co., 213 U. S. 268, applied. In the Deni case the Supreme Court of Pennsylvania, passing upon a statute of the state which permitted certain named relatives to recover damages for death accruing through negligence, held that the statute had no extra-territorial force and that plaintiff in the action was not within its purview, though its language possibly admitted of the inclusion of non-resident aliens. The Maiorano case came to this court on a writ of error to the Supreme Court of Pennsylvania where the doctrine of the Deni

> case was repeated and applied. This ruling was simply accepted by this court as the construction of the state statute by the highest court of the state. We concede some strength of persuasion to the Pennsylvania decision, but it may be opposed to the ruling in other jurisdictions, Mulhall vs Fallon, 176 Mass. 266; Kellyville Coal Co. vs. Petraytis, 195 Ill. 217; Atchison, Topeka & Santa Fe Ry. Co. vs. Mateo Fajardo et ux, 74 Kan. 314. In the latter case and in Mulhall vs. Fallon many other cases are reviewed, including English and Canadian cases and it was concluded that the weight of authority in this country and in England was that alienage is not a condition affecting a recovery under such acts as that involved in this case."

Also the doctrine of the Maiorano case was changed by statute in Pennsylvania by the act of 1911, supra.

Regardless, however, of what might be considered the rule under the Maiorano case, the treaty of 1913 with Italy, supra, definitely established the rights of non-resident aliens of that country. The Kingdom of Italy vigorously protested the interpretation of the treaty of 1871 by our courts, making a discrimination against Italians on account of non-residence and contended that it was the intention of the high contracting parties to grant equal rights and privileges to their respective citizens; that it was not the intention of the parties to make any distinction as to residence or non-residence of those citizens; and that it was an unjust discrimination to preclude an Italian citizen from any right because that citizen was a resident of Italy or elsewhere outside the jurisdiction of the United States. For the correspondence between the United States and Italy in regard

to the alleged discrimination, see Foreign Relations of the United States, 1910, pages 657 to 673, and for the right of the court to examine and consider this correspondence see Kinkead vs. United States 150 U. S. 483, United States vs. Texas, 162 U. S. 1 (pages 23-27): In re Ross, 140 U. S. 453; Crandall on "Treaties, Their Making and Enforcement" 2nd Ed., page 377.

The Kingdom of Italy in order to remedy the conditions brought about by the decision in the Maiorano case proposed an amendment to the Treaty of 1871 in which it should be made clear that actions on account of accidents should be open to the relatives of deceased Italians even though said relatives should not reside in the United States. The purpose of the proposed amendment is succinctly stated in a memorandum to the Secretary of the State from the Italian Embassy under date of March 21st, 1910, (page 663 Foreign Relations, Supra):

> "As a remedy to the condition of affairs resulting from the judgment rendered in the Maiorano case, which condition is contrary to the letter and spirit of the treaty, the King's Government proposes: either an additional agreement under which it will be made clear that according to the interpolation indisputably put upon Article 3 of the Treaty of 1871, by the King's Government, action on account of accidents is open to the relatives of the deceased Italian, even though they may not reside within the territory of the United States, so that no doubt can any longer be entertained by the judicial authorities as to the scope of the said Article or an arbitration, etc."

In pursuance of this suggestion and for the pur-

poses therein set forth, the United States Government negotiated the Treaty of 1913 with the Italian Government. The object of the new language in the amended Treaty was designed to accomplish the purposes set forth in the above correspondence.

Treaties to be construed in the light of the objects for which they were negotiated.

It is a familiar rule of construction that a Treaty should be construed so as to give effect to the object designed to be acomplished by the Treaty and to that end all its provisions must be examined in the light of surrounding circumstances. The court in the case of In re Ross, supra, (475), has this to say, inter alia:

> "it is a cannon of interpretation to so construe a law or Treaty as to give effect to the object designed, and for that purpose all of its provisions must be examined in the light of attendant and surrounding circumstances. To some terms and expressions a literal meaning will be given and to others a larger and more extended one. The reports of the adjudged cases and approved legal Treatises are full of illustrations of the application of this rule. The inquiry in all such cases is as to what was intended in the law by the Legislature and in the Treaty by the contracting parties." Also see Tucker vs. Alexandroff, 183 U. S. 424, (437).

TREATIES TO BE LIBERALLY CONSTRUED

Another familiar principle of interpretation is that Treaties are to receive a liberal construction and that where a Treaty admits of two constructions, one restrictive as to the rights that may be claimed under

it and the other liberal and favorable to them, the latter will be preferred.

> Hauenstein vs. Lynham 100 U. S. 483, (487); Shanks vs. Dupont, 3 Pet. 243, (249); Geoffrey vs. Riggs, 133 U. S. 258, (271-272).

This court has already placed a very liberal construction on the Treaty of 1871, in which the amended Treaty stands in pari materia, except that the amendment gives greater security to Italian citizens. In Storti vs. Massachusetts, 183 U. S. 138, (142), this court considered the former Treaty with Italy as guaranteeing "equality of treatment and that the same rights be accorded to a citizen of Italy that are given to a citizen of the United States under like circumstances."

It is respectfully submitted that an examination of the amended Treaty in the light of these principles and rules of construction and also in the light of the liberal interpretation of the Treaty of 1871 forces the conclusion that the Treaty of 1913 grants to Italian citizens who are not residents of the United States equal rights with the United States citizens in respect to actions on account of accidental death. And it should be noted that the Treaty is prospective; it says that in this respect Italian non-residents shall have not only the same rights which are, but also which shall be, granted to citizens of the United States.

> The Pennsylvania Workmen's Compensation Act grants a right to citizens or residents of this country, but withholds the same from non-resident Italians, and is contrary to the Treaty with Italy and therefore is inoperative in so far as it withholds that right.

Section 307, of the Pennsylvania Workmen's Compensation Act grants a right of action on account of

death from injury to widowers, parents, brothers and sisters of deceased employees. Section 310 of the Act, however, stipulates that non-resident aliens of this class shall not enjoy that right. It is plain that here there is a right given to citizens or residents of Pennsylvania and denied to non-resident citizens of Italy, and it is likewise plain that this is a discrimination in contravention of the Treaty with Italy and is therefore void and inoperative, since Treaties are the supreme law of the land and statutes of states contrary thereto are void.

> Art. VI. of the United States Constitution; Chew Heong vs. United States 112 U. S. 536; Tucker vs. Alexandroff Supra; Bahand, et al. vs. Bize, 105 Fed. 485; Ware vs. Hilton, 3 Dall. 199.

SIMILAR CASES

This case is similar in principle to Bahand vs. Bize, Supra, where the United States Government had negotiated a Treaty with France removing the disability of alienage to inherit property. Subsequent to the Treaty a statute of Nebraska placed non resident aliens under a disability to inherit. The court held that on account of the Treaty with France the statute was void and inoperative as to French citizens and that plaintiff therefore in that case who was a French non-resident was entitled to inherit.

> Also see Geoffrey vs. Riggs, Supra; In re Stixrud's Estate, 58 Wash. 339.

The guaranty by Treaty to aliens of a certain nation that the same rights, privileges and protection shall be granted to citizens of that country which are accorded to United States citizens should prop-

erly be construed in the light of the decisions on the constitutional guaranty of equal privileges and immunities to United States citizens under the Fourteenth Amendment of the United States Constitution, although this provision does not extend to aliens, Gandalfo vs. Hartman, 49 Fed. 181. And, therefore, the principles enunciated in Quong Ham Wah vs. Industrial Accident Commission, 184 Cal. 26, are applicable to this case.

The Pennsylvania Appellate Courts have put a restrictive and unnatural interpretation on the Treaty.

The Pennsylvania Appellate courts interpret the Treaty of 1913 merely as giving a right of action to non-resident Italians on account of death through negligence and, therefore, the courts say, the Treaty does not cover an action under the Workmen's Compensation Act where a right of action is given to the relatives on account of the death of an employee whether or not there is any negligence on the part of the defendant. We submit that this is a narrow and unnatural interpretation of the Treaty of 1913. In the correspondence referred to above the Italian Government uses the phrase "actions on account of accidents." Nowhere does it appear in this correspondence that it was the intention of the parties to limit the scope of the new Treaty to actions where there should be death through negligence on the part of the defendant. Nor does any interpretation of the language of the amendment admit of any such construction. The language pertinent to the interpretation of the amendment reads as follows: "including that form of protection granted by any state or national law which establishes a civil responsibility for injuries or for death caused by negligence

or fault and gives to the relatives or heirs of the injured party a right of action, etc." The two phrases "for injuries or death caused by negligence or fault" are in the disjunctive. We think the phrase "and gives to the relatives or heirs of the injured party a right of action" should properly be considered as referring to both clauses, and therefore the treaty should be construed as guaranteeing a right of action generally to the relatives or heirs for all injuries resulting in death. It is submitted that it is an unnatural construction to interpret the latter phrase as referring back only to the phrase "for death caused by negligence or fault." We do not know what rule of construction would suggest that the last phrase should refer to either one of the preceding phrases to the exclusion of the other. But if such a distinction is to be made we believe it would be more logical to have the clause containing "injured parties" to refer back to the one containing "injuries," since the verbal adjective "injured" is an inflection of thenoun "injury;" both words having the same stem. The phrase containing the verbal adjective would naturally refer to the clause containing the noun from which the said verbal adjective was inflected. We think, however, that a proper construction of the language of the amended Treaty demands that the latter phrase modifies both of the disjunctive phrases and therefore actions on account of injuries resulting in death, whether by negligence or otherwise, should be available to the citizens of the contracting parties on terms of equality. Many of the states had Workmen's Compensation legislation at the time the Treaty was negotiated. Certainly it was not the intention of the

parties to exclude their subjects from the benefits of such legislation.

The interpretation of the Supreme and Superior Courts of Pennsylvania, we believe, does violence to the natural construction of the words of the Treaty, but if there could be any doubt as to what meaning should be put on these words, it is submitted that the rule fo Hauenstein vs. Lynham, supra, should apply, namely; that where language admits of two interpretations one of which is restrictive of rights and the other favorable to them the latter is to be preferred, and in this case therefore, the language of the Treaty should be interpreted not as restricting the right under the Treaty to actions on account of death through negligence, but as including the right generally to bring actions on account of injuries resulting in death.

Finally, we do not believe the Court's reasoning is sound even under their interpretation of the Treaty. If the Treaty should be narrowly construed as giving a right of action only where there is death through negligence, then Italians would have a right of action under the Workmen's Compensation Act for death due to negligence, since the Workmen's Compensation Act is a broad and comprehensive act and includes the situation where there is a death due to negligence as well as where there was no negligence causing the death.

> Nor have the Appellate Courts of Pennsylvania satisfactorily answered the position taken by the learned lower court.

Nor do we think that the Appellate Courts have satisfactorily answered the position taken by the

learned Lower Court, namely that an independent property right under the terms of the Workmen's Compensation Act was given to the relatives of the deceased employee which was not properly the subject of a contract between the employer and employee, and hence the employee could not contract away the rights of the said relatives since there was no privity of contract between the relatives and the employee (R. 13). There is no suggestion in the discussion of this point by the Superior Court that they considered the relatives or heirs in privity of contract with the employee, for the very obvious reason that such a construction by the Superior Court would have been contrary to the Constitutional provision that the rights of these relatives or heirs should be considered as separate and independent from any right existing in the employee, and the very suggestion of privity of contract negatives the theory of separate and independent rights in the relatives or heirs. The learned Lower Court considered that the relatives obtained their rights not by way of succession through the contract, but by virtue of the positive enactment of the legislature. The Superior Court attempts to reduce the Lower Court's position to an absurdity by saying that if it were true that the relatives of non-resident aliens were not bound by the contract of the employee, then it also must follow that relatives or heirs who are citizens of this country are not bound by the contract and the latter, therefore, would have the right to maintain an action for damages as before the passage of the Act, and hence, the Court reasoned that the beneficent provisions of the Act would be avoided. Such reasoning by the Superior Court would be justified had the Lower Court con-

sidered that the said relatives obtained their rights by way of succession through the contract of the employee, but the Lower Court did not so consider the case, as we have before stated. The position of the Lower Court may be briefly stated as follows: the employee can make a contract with his employer and the state by virtue of its police power can fix a status on people whose rights are independent of that contract, but when the legislature under that status confers rights on citizens or residents of this country it is likewise bound, on account of the Treaty with Italy, to confer equal rights on Italian citizens whether residents or non-residents of this country. Clearly under a proper view of the Lower Court's opinion it is a non sequitur to say that because the provision denying non-resident Italians equal rights is void as contravening the Treaty, that also the provision granting the same rights to citizens or residents of this country is void. In fact just the opposite is true; the legislation is valid as to citizens or residents, being valid police legislation, but is inoperative as to non-resident Italians on account of the Treaty and the said Italians, therefore, are entitled to enjoy a parity of rights with said citizens or residents. It, therefore, does not follow, according to the learned Lower Court's reasoning, that if the provision excluding non-resident aliens is void, that the beneficent provisions of the Act would be avoided as to citizens or residents.

CONCLUSION

The effect of the Pennsylvania Supreme Court's decision is to revert to the doctrine of the Maiorano case, namely that this is a new right and can be granted upon such terms to non-resident aliens as

the legislature may deem fit. It is a decision contrary to the letter and spirit of the Treaty of 1913 with Italy, which Treaty was negotiated to avoid the very discrimination which this Act makes, namely, a discrimination based on the non-residence of Italian subjects, and it is, therefore, a decision which we believe is most unjust.

Wherefore, we respectfully submit that the judgment of the Supreme Court of Pennsylvania reversing the judgment of the Court of Common Pleas of Dauphin County was erroneous and that the judgment of said Supreme Court should be reversed.

Respectfully submitted,

PAUL A. KUNKEL,
GEORGE ROSS HULL,
WILLIAM HAMLIN NEELY.

APPENDIX

1.

THE PENNSYLVANIA WORKMEN'S COMPENSATION ACT OF 1915, AS AMENDED 1919 AND 1921.

Note—Changes in the Act made in 1919 are indicated by italics. Amendments made by 1921 Legislature are indicated by bold face type.

DEFINING THE LIABILITY OF AN EMPLOYER TO PAY DAMAGES FOR INJURIES RECEIVED BY AN EMPLOYE IN THE COURSE OF EMPLOYMENT; ESTABLISHING AN ELECTIVE SCHEDULE OF COMPENSATION; AND PROVIDING PROCEDURE FOR THE DETERMINATION OF LIABILITY AND COMPENSATION THEREUNDER.

Article I. Interpretation and definition.

Article II. Defining the liability of an employer in an action at law for damages for personal injury to an employe, and abolishing in whole or in part certain defenses thereto.

Article III. Establishing a system of compensation by agreement; prescribing the method by which such agreement shall be made and terminated; defining the injuries for which compensation is payable, the persons to whom it is payable, its amount, and the condition under which and the manner in which it is payable.

Article IV. Providing a procedure for the determination and settlement of claims for compensation.

Article V. General provisions.

ARTICLE I.

INTERPRETATION AND DEFINITION.

Section 1. Be it enacted, &c., That this act shall be called and cited as The Workmen's Compensation Act of 1915, and shall apply to all accidents occurring within this Commonwealth, irrespective of the place where the contract of hiring was made, renewed, or extended, and shall not apply to any accident occurring outside of the Commonwealth.

Section 102. Wherever in this act the singular is used, the plural shall be included; where the masculine gender is used, the feminine and neuter shall be included.

Section 103. The term "employer" as used in this act is declared to be synonymous with master, and to include natural persons, partnerships, joint-stock companies, corporations for profit, corporations not for profit, municipal corporations, the Commonwealth, and all governmental agencies created by it.

Section 104. The term "employee" as used in this act is declared to be synonymous with servant, and includes all natural persons who perform services for another for a valuable consideration, exclusive of persons whose employment is casual in character and not in the regular course of the business of the employer, and exclusive of persons to whom articles or materials are given out to be made up, cleaned, washed, altered, ornamented, finished or repaired, or adapted for sale, in the worker's own home, or on other premises not under the control or management of the employer.

Section 105. The term "contractor" as used in article two, section two hundred and three, and article three, section three hundred and two (b), shall not include a contractor engaged in an independent business, other than that of supplying laborers or assistants, in which he serves persons other than the employer in whose service the accident occurs, but shall include a sub-contractor to whom a principal contractor has sublet any part of the work which such principal contractor has undertaken.

Section 106. The exercise and performance of the powers and duties of a local or other public authority shall, for the purposes of this act, be treated as the trade or business of the authority.

Section 107. The term "Bureau" when used in this act shall mean the Bureau of Workmen's Compensation of the Department of Labor and Industry.

The term "Board" when used in this act shall mean the Workmen's Compensation Board of the Bureau.

ARTICLE II.

DAMAGES BY ACTION AT LAW

Section 201. That in any action brought to recover damages for personal injury to an employe in the course of his employment, or for death resulting from such injury, it shall not be a defense—

(a) That the injury was caused in whole or in part by the negligence of a fellow employe; or

(b) That the employe had assumed the risk of the injury; or

(c) That the injury was caused in any degree by

the negligence of such employe, unless it be established that the injury was caused by such employe's intoxication or by his reckless indifference to danger. The burden of proving such intoxication or reckless indifference to danger shall be upon the defendant and the question shall be determined by the jury.

Section 202. The employer shall be liable for the negligence of all employes, while acting within the scope of their employment, including engineers, chauffeurs, miners, mine-foremen, fire-bosses, mine superintendents, plumbers, officers of vessels, and all other employes licensed by the State or other governmental authority, if the employer be allowed by law the right of free selection of such employes from the class of persons thus licensed; and such employes shall be the agents and representatives of their employers, and their employers shall be responsible for the acts and neglects of such employes, as in the case of other agents and employes of their employers; and, notwithstanding the employment of such employes, the property in and about which they are employed, and the use and operation thereof, shall at all times be under the supervision, management and control of their employers.

Section 203. An employer who permits the entry upon premises occupied by him or under his control, of a laborer or an assistant hired by an employe or contractor, for the performance upon such premises of a part of the employer's regular business entrusted to such employe or contractor, shall be liable to such laborer or assistant in the same manner and to the same extent as his own employe.

Section 204. No agreement, composition, or re-

lease of damages made before the happening of any accident, except the agreement defined in article three of this act, shall be valid or shall bar a claim for damages for the injury resulting therefrom; and any such agreement, other than that defined in article three herein, is declared to be against the public policy of this Commonwealth. The receipt of benefits from any association, society or fund shall not bar the recovery of damages by action at law, nor the recovery of compensation under article three hereof; and any release executed in consideration of such benefits shall be void.

ARTICLE III.

ELECTIVE COMPENSATION.

Section 301. When employer and employe shall by agreement, either express or implied, as hereinafter provided, accept the provisions of article three of this act, compensation for personal injury to, or for the death of, such employe, by an accident, in the course of his employment, shall be made in all cases by the employer, without regard to negligence, according to the schedule contained in sections three hundred and six and three hundred and seven of this article; provided that no compensation shall be made when the injury or death be intentionally self-inflicted, but the burden of proof of such fact shall be upon the employer.

The terms "injury" and "personal injury" as used in this act shall be construed to mean only violence to the physical structure of the body, and such disease or infection as naturally results therefrom; and wherever death is mentioned as a cause for com-

pensation under this act, it shall mean only death resulting from such violence and its resultant effects, and occurring within three hundred weeks after the accident. The term "injury by an accident in the course of his employment," as used in this article, shall not include an injury caused by an act of a third person intended to injure the employe because of reasons personal to him, and not directed against him as an employe or because of his employment; but shall include all other injuries sustained while the employe is actually engaged in the furtherance of the business or affairs of the employer, whether upon the employer's premises or elsewhere, and shall include all injuries caused by the condition of the premises or by the operation of the employer's business or affairs thereon, sustained by the employe, who, though not so engaged, is injured upon the premises occupied by or under the control of the employer, or upon which the employer's business or affairs are being carried on, the employe's presence thereon being required by the nature of his employment.

Section 302. (a) In every contract of hiring made after December thirty-first, one thousand nine hundred and fifteen, and in every contract of hiring renewed or extended by mutual consent, expressed or implied, after said date, it shall be conclusively presumed that the parties have accepted the provisions of article three of this act, and have agreed to be bound thereby, unless there be, at the time of the making, renewal, or extension of such contract, an express statement in writing, from either party to the other, that the provisions of article three of this act are not intended to apply, and unless a true

copy of such written statement, accompanied by proof of service thereof upon the other party, setting forth under oath or affirmation the time, place, and manner of such service, be filed with the Bureau within ten days after such service and before any accident has occurred. Every contract of hiring, oral, written, or implied from circumstances now in operation, or made or implied on or before December thirty-first, one thousand nine hundred and fifteen, shall be conclusively presumed to continue subject to the provisions of article three hereof, unless either party shall, on or before said date, in writing, have notified the other party to such contract that the provisions of article three hereof are not intended to apply, and unless there shall be filed with the Bureau a true copy of such notice, together with proof of service, within the time and in the manner hereinabove prescribed; Provided, however, That the provisions of this section shall not be so construed as to impair the obligation of any contract now in force. In the employment of minors, article three shall be presumed to apply, unless the said written notice be given by or to the parent or guardian of the minor. It shall not be lawful for any officer or agent of this Commonwealth, or for any county, city, borough, or township therein, or for any officer or agent thereof, or for any other governmental authority created by the laws of this Commonwealth, to give notice of such rejection of the provisions of this article to any employe of the State or of such governmental agency.

(b) After December thirty-first, one thousand nine hundred and fifteen, an employer who permits the entry, upon premises occupied by him or under

his control, of a laborer or an assistant hired by an employe or contractor, for the performance upon such premises of a part of the employer's regular business entrusted to that employe or contractor, shall be conclusively presumed to have agreed to pay to such laborer or assistant compensation in accordance with the provisions of article three, unless the employer shall post in a conspicuous place, upon the premises where the laborer's or assistant's work is done, a notice of his intention not to pay such compensation, and unless there be filed with the Bureau, within ten days thereafter and before any accident has ocurred, a true copy of such notice, together with proof of the posting of the same, setting forth upon oath or affirmation the time, place and manner of such posting; and after December thirty-first, one thousand nine hundred and fifteen, any such laborer or assistant who shall enter upon premises occupied by or under the control of such employer for the purpose of doing such work shall be conclusively presumed to have agreed to accept the compensation provided in article three, in lieu of his right of action under article two, unless he shall have given notice in writing to the employer, at the time of entering upon such employer's premises for the purpose of doing his work, of his intention not to accept such compensation, and unless within ten days thereafter and before any accident has occurred there shall have been filed with the Bureau a true copy of such notice, accompanied by proof of service thereof upon such employer, setting forth under oath or affirmation the time, place and manner of such service. And in such cases, where article three binds such employer and such laborer or assistant, it shall not be in effect between the intermediate employer

or contractor and such laborer or assistant, unless otherwise expressly agreed.

Section 303. Such agreement shall constitute an acceptance of all the provisions of article three of this act, and shall operate as a surrender by the parties thereto of their rights to any form or amount of compensation or damages for any injury or death occurring in the course of the employment, or to any method of determination thereof, other than as provided in article three of this act. Such agreement shall bind the employer and his personal representatives, and the employe, his or her wife or husband, widow or widower, next of kin, and other dependents.

Section 304. Any agreement between employer and employe for the operation or non-operation of the provisions of article three of this act may be terminated prior to any accident, by either party, upon sixty days' notice to the other in writing, if a copy of such notice, with proof of service, be filed in the Bureau, as provided in section three hundred and two of this article.

Section 305. Every employer liable under this act to pay compensation shall insure the payment of compensation in the State Workmen's Insurance Fund, or in any insurance company, or mutual association or company, authorized to insure such liability in this Commonwealth, unless such employer shall be exempted by the Bureau from such insurance. An employer desiring to be exempt from insuring the whole or any part of his liability for compensation shall make application to the Bureau, showing his financial ability to pay such compensa-

tion, whereupon the Bureau, if satisfied of the applicant's financial ability, shall by written order make such exemption. The Bureau may, from time to time, require further statements of the financial ability of such employer, and, if at any time such employer appear no longer able to pay compensation, shall revoke its order granting exemption; in which case the employer shall immediately subscribe to the State Fund, or insure his liability in a mutual association or company, as aforesaid.

If any employer fails to comply with the provisions of this section the bureau shall serve, by registered mail or in such other manner as the rules and regulations of the bureau shall provide, upon such employer a notice to comply forthwith with such provisions; and if such employer does not, within thirty days thereafter, insure his liability as aforesaid or obtain exemption from such insurance, such employer shall pay a penalty the sum of one dollar ($1.00) per diem for each employe during the continuance of such failure to insure or obtain exemption, which sum shall be collectible by the Bureau of Workmen's Compensation in the same manner as debts of like amounts are now by law recovered. All moneys so received by the bureau shall be immediately covered into the State Treasury: Provided, however, That a second notice, with bill for fines incurred, sent by registered mail, shall be served on employers within thirty days after their fines begin to run.

Section 806. The following schedule of compensation is hereby established for injuries resulting in total disability:

(a) For the first five hundred weeks after the *tenth* day of total disability, *sixty* per centum of the wages of the injured employe as defined in section three hundred and nine; but the compensation shall not be more than *twelve* dollars per week nor less than *six* dollars per week, and shall not exceed in aggregate the sum of *five* thousand dollars: Provided, That, if at the time of injury the employe receives wages of less than *six dollars per week, then he shall* receive the full amount of such wages per week as compensation. Nothing in this clause shall require the payment of compensation after disability shall cease. Should partial disability be followed by total disability, the period of five hundred weeks mentioned in this clause of this section shall be reduced by the number of weeks during which compensation was paid for such partial disability.

(b) For disability partial in character (except the particular cases mentioned in clause (c), *sixty* per centum of the difference between the wages of the injured employe, as defined in section three hundred and nine, and the earning power of the employe thereafter; but such compensation shall not be more than *twelve* dollars per week. This compensation shall be paid during the period of such partial disability; not, however, beyond three hundred weeks after the *tenth* day of such *partial* disability. Should total disability be followed by partial disability, the period of three hundred weeks mentioned in this clause shall be reduced by the number of weeks during which compensation was paid for such total disability.

(c.) For all disability resulting from permanent injuries of the following classes, the compensation shall be exclusively as follows:

For the loss of a hand, *sixty* per centum of wages during one hundred and seventy-five weeks.

For the loss of an arm, *sixty* per centum of wages during two hundred and fifteen weeks.

For the loss of a foot, *sixty* per centum of wages during one hundred and fifty weeks.

For the loss of a leg, *sixty* per centum of wages during two hundred and fifteen weeks.

For the loss of an eye, *sixty* per centum of wages during one hundred and twenty-five weeks.

For the loss of any two or more of such members, not constituting total disability, *sixty* per centum of wages during the aggregate of the period specified for each.

For serious and permanent disfigurement of the head and face of such a character as to produce an unsightly appearance and such as is not usually incident to the employment, sixty per centum of the wages not to exceed one hundred and fifty weeks.

Unless the Board shall otherwise determine, the loss of both hands or both arms or both feet or both legs or both eyes shall constitute total disability, to be compensation according to the provisions of clause (a).

Amputation between the elbow and the wrist shall be considered as the equivalent of the loss of a hand, and amputation between the knee and ankle shall be considered as the equivalent of the loss of a foot. Amputation at or above the elbow shall be considered as the loss of an arm, and amputation at or above the knee shall be considered as the loss of a leg. Permanent loss of the use of a hand, arm, foot, leg or eye

shall be considered as the equivalent of the loss of such hand, arm, foot, leg or eye.

This compensation shall not be more than *twelve* dollars per week nor less than *six* dollars per week: Provided, That, if at the time of injury the employe receives wages of less than *six* dollars per week, then he shall receive the full amount of such wages per week as compensation.

(d) No compensation shall be allowed for the first *ten* days after disability begins, except as hereinafter provided in clause (e) of this section.

(e) During the first *thirty* days after disability begins, the employer shall furnish reasonable surgical and medical services, medicines and supplies, as and when needed, unless the employe refuses to allow them to be furnished by the employer. The cost of such services, medicines and supplies shall not exceed *one hundred* dollars. If the employer shall, upon application made to him refuse to furnish such services, medicines and supplies, the employe may procure the same, and shall receive from the employer the reasonable cost thereof within the above limitations. *In addition to the above services, medicines and supplies, hospital treatment, services and supplies shall be furnished by the employer for the said period of thirty days. The cost for such hospital treatment, service and supplies shall not in any case exceed the prevailing charge in the hospital for like services to other individuals.* If the employe shall refuse reasonable surgical, medical and hospital services, medicines nad supplies, tendered to him by his employer, he shall forfeit all right to compensation for any injury or any increase in his in capacity shown to have resulted from such refusal,

(f) Should the employe die as a result of the injury, the period during which compensation shall be payable to his dependents, under section three hundred and *seven* of this article, shall be reduced by the period during which compensation was paid to him in his life-time, under this section of this article. No reduction shall be made for the amount which may have been paid for medical and hospital services, and medicines, nor for the expenses of the last sickness and burial. Should the employe die from some other cause than the injury, the liability for compensation shall cease.

Section 307. In case of death compensation shall be computed on the following basis, and distributed to the following persons:

1. To the child or children, if there be no widow nor widower entitled to compensation, *thirty* per centum of wages of deceased, with ten per centum additional for each child in excess of two, with a maximum of sixty per centum, to be paid to their guardian.

2. To the widow or widower, if there be no children, forty per centum of wages.

3. To the widow or widower, if there be one child, *fifty* per centum of wages.

4. To the widow or widower, if there be two or *more* children, *sixty* per centum of wages.

5. If there be neither widow, widower, nor children *entitled to compensation*, then to the father *or* mother, if dependent to any extent upon the employe at the time of *the accident*, twenty per centum of wages: *Provided, however, That in the case of a minor child*

who has been contributing to his parents, the dependency of said parents shall be presumed. And provided further, That if the father or mother was totally dependent upon the deceased employe at the time of the accident, the compensation payable to such father or mother shall be forty per centum of wages.

6. If there be neither widow, widower, children nor dependent parent *entitled to compensation*, then to the brothers and sisters, if actually dependent to any extent upon the decedent for support at the time of his death, fifteen per centum of wages for one brother or sister, and five per centum additional for each additional brother or sister, with a maximum of twenty-five per centum; such compensation to be paid to their guardian.

7. Whether or not there be dependents as aforesaid, the reasonable expenses of the last sickness and burial, not exceeding one hundred dollars (without deduction of any amounts theretofore paid for compenstaion or for medical expenses), payable to the dependents, or, if there be no dependents, then to the personal representatives of the deceased.

Compensation shall be payable under this section to or on account of any child, brother or sister, only if and while such child, brother and sister is under the age of sixteen. No compensation shall be payable under this section to a widow, unless she was living with her deceased husband at the time of his death, or was then actually dependent upon him for support. No compensation shall be payable under this section to a widower, unless he be incapable of self-support at the time of his wife's death and be at such time dependent upon her for support. The terms "child" and "chil-

dren" shall include stepchildren and adopted children and children to whom he stood in loco parentis, if members of defendant's household at the time of his death, and shall include posthumous children. Should any dependent of a deceased employe die *or remarry,* or should the widower become capable of self-support, the right of such dependent or widower, to compensation under this section, shall cease: *Provided, however, That upon the remarriage of any widow, other than a non-resident alien widow, the employer shall pay to such widow the then value of the compensation payable to her, during one-third of the period during which compensation then remains payable but not exceeding one hundred weeks, calculated in accordance with the provisions of section three hundred and sixteen of this article.* If the compensation payable under this section to any person shall, for any cause, cease, the compensation to the remaining persons entitled thereunder shall thereafter be the same as would have been payable to them had they been the only persons entitled to compensation at the time of the death of the deceased.

The wages upon which death compensation shall be based shall not in any case be taken to exceed twenty dollars per week, nor be less than ten dollars per week.

This compensation shall be paid during three hundred weeks, and, in the case of children entitled to compensation under this section, the compensation of each child shall continue after said period of three hundred weeks until such child reach the age of sixteen, at the rate of fifteen per centum of wages, if there be but one child, with ten per centum additional for each additional child, with a maximum of fifty per

centum. *The board may, if the best interest of a child or children shall so require, at any time order and direct the compensation payable to a widow or widower on account of any child or children, to be paid to the guardian of such child or children, or, if there be no guardian, to such other person as the board as hereinafter provided may direct. If there be no guardian or committee of any minor, dependent, or insane employe or dependent on whose account compensation is payable, the amount payable on account of such minor, dependent, or insane employe or dependent may be paid to any surviving parent, or to such other person as the Board may order and direct, and the Board may require any person, other than a guardian or committee, to whom it has directed compensation for a minor, dependent, or insane employe or dependent to be paid, to render, as and when it shall so order, accounts of the receipts and disbursements of such person, and to file with it a satisfactory bond in a sum sufficient to secure the proper application of the moneys received by such person.*

Section 308. Except as hereinafter provided, all compensation payable under this article shall be payable in periodical installments, as the wages of the employe were payable before the accident.

Section 309. Wherever in this article the term "wages" is used, it shall be construed to mean the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, and shall not include gratuities received from the employer or others nor shall it include amounts deducted by the employer under the contract of hiring for labor furnished or paid for by the employer, and necessary for the performance of such contract by the

employe; *but shall include board and lodging received from the employer. Whenever the employe receives board and lodging as a part of his wages, the board shall be rated at fifty cents per day, and board together with lodgnig shall be rated at one dollar per day, for the purpose of computing wages.* In seasonal occupations the employe's weekly wages shall be taken to be one-fiftieth of the total wages which he has earned from all occupations during the year immediately preceding the accident, unless it be shown that during such year, by reason of exceptional causes, such method of computation does not ascertain fairly the earnings of the employe; in which case the period for calculation shall be extended so far to give a basis for the fair ascertainment of his average weekly earnings. In continuous employments, if immediately prior to the accident the rate of wages was fixed by the day or hour, or by the output of the employe, his weekly wages shall be taken to be five and one-half times his average earnings at such rate for a working day, and using as a basis of calculation his earnings during so much of the preceding six months as he worked for the same employer: *Provided, however, That if the employe regularly and habitually worked more than five and one-half days per week, the weekly wage shall be found by multiplying his average earnings for working day by six, six and one-half or seven, according to the customary number of working days constituting an ordinary week in his occupation or trade.* Where the employe is working under concurrent contracts with two or more employers, his wages from all employers shall be considered as if earned from the employer liable for compensation.

In cases where the employe has been in the employ

of the employer less than one full week, and by reason of the shortness of time during which the employe has been in the employment of the employer or the nature or trems of the employment it is impracticable to ascertain the average weekly wages as hereinbefore provided, the average wekly amount which during the six months previous to the injury has been earned by other persons employed by the same employer under similar contracts of hiring, or, if there are no persons so employed, by other persons employed by other employers under similar contracts of hiring under similar conditions, shall be taken as the basis for the ascertainment of the weekly wages of such employe.

This act shall not modify or in any way impair the obligations of any contract made before the date of its approval.

The provisinos of sections 306, 307 and 309 of this act shall not apply to any accident occurring prior to midnight on the thirty-first day of December, one thousand nine hundred and nineteen.

Section 310. Compensation under this article to alien dependent widows and children, not residents of the United States, shall be two-thirds of the amount provided in each case for residents; and the employer may, at any time, commute all future instalments of compensation payable to alien dependents, not residents of the United States, by paying to such alien dependents the then value thereof, calculated in accordance with the provisions of section three hundred and sixteen of this article. Alien widowers, parents, brothers and sisters, not residents of the United States, shall not be entitled to any compensation.

Non-resident alien dependents may be officially represented by the Consular officers of the nation of which such alien or aliens may be citizens or subjects, and in such cases the Consular officers shall have the right to receive, for distribution to such non-resident alien dependents, all compensation awarded hereunder, and the receipt of such Counsular officers shall be a full discharge of all sums paid to and received by them.

Section 311. Unless the employer shall have actual knowledge of the occurrence of the injury, or unless the employe or some one in his behalf, or some of the dependents or some one in their behalf, shall give notice thereof to the employer within fourteen days after the accident, no compensation shall be due until such notice be given or knowledge obtained; but if the employe or other beneficiary shall show his delay in giving notice was due to his mistake or ignorance of fact or of law, or to his physical or mental inability, or to fraud, misrepresentation or deceit, or to any other reasonable cause or excuse, then compensation shall be allowed, unless the employer shall show that he did not know, and by reasonable diligence could not have learned, of the accident, and that he was prejudiced by the delay; in which case he shall be relieved to the extent of such prejudice.

Section 312. The notice referred to in section three hundred and eleven hereof shall be substantially in the following form:

To (name of employer).

You are hereby notified that an injury of the following character (.....) was suffered by (name of employe injured), who was in your employment at (place), while engaged as (kind of em-

ployment) on or about the ( ) day of ( ), Anno Domini ( ), and that compensation will be claimed therefor.

Date: Signed ( )

But no variation from this form shall be material if the notice be sufficient to inform the employer that a certain employe, by name, received an injury, the character of which is described in ordinary language, in the course of his employment on or about a time specified and at or near a place specified.

Section 313. The notices referred to in section three hundred and two and section three hundred and eleven hereof may be served personally upon the employer, or upon the manager or superintendent in charge of the works or business in which the accident occurred, or by sending them through the registered mail to the employer at his or its last known residence or place of business, or, if the employer be a corporation either foreign or domestic, then upon the president, vice-president, secretary or treasurer thereof. Knowledge of the occurrence of the injury on the part of any of said agents shall be the knowledge of the employer.

Section 314. At any time after an injury the employe, if so requested by his employer, must submit himself for examination, at some reasonable time and place, to a physician or physicians legally authorized to practice under the laws of such place, who shall be selected and paid by the employer. If the employe shall refuse, upon the request of the employer, to submit to the examination by the physician or physicians selected by the employer, the Board may, upon petition of the employer, order the employe to submit to an examination at a time and place set by it, and by the

physician or physicians selected and paid by the employer, or by a physician or physicians designated by it and paid by the employer; and if the employe shall, without reasonable cause or excuse, disobey or disregard such order, he shall be deprived of his right to compensation under this article. The Board may at any time after such first examination, upon petition of the employer, order the employe to submit himself to such further examinations as it shall deem reasonable and necessary, at such times and places and by such physicians as it may designate; and, in such case, the employer shall pay the fees and expenses of the examining physician or physicians, and the reasonable traveling expenses and loss of wages incurred by the employe in order to submit himself to such examination. The refusal or neglect, without reasonable cause or excuse, of the employe to submit to such examination ordered by the Board, either before or after an agreement or award, shall deprvie him of the right to compensation, under this article, during the continuance of such refusal or neglect, and the period of such neglect or refusal shall be deducted from the period during which compensation would otherwise be payable.

The employe shall be entitled to have a physician or physicians of his own selection, to be paid by him, partcipate in any examination requested by his employer or ordered by the Board.

Section 315. In cases of personal injury all claims for compensation shall be forever barred, unless, within one year after the accident, the parties shall have agreed upon the compensation payable under this article; or unless, within one year after the accident, one of the parties shall have filed a petition as pro-

vided in article four hereof. In cases of death all claims for compensation shall be forever barred, unless, within one year after the death, the parties shall have agreed upon the compensation under this article; or unless, within one year after the death, one of the parties shall have filed a petition as provided in article four hereof. Where, however, payments of compensations have been made in any case, said limitations shall not take effect until the expiration of one year from the time of the making of the last payment.

Section 316. The compensation contemplated by this article may at any time be commuted by the Board, at its then value when discounted at five per centum interest, with annual rests, disregarding the probability of the beneficiary's death, upon application of either party, with due notice to the other, if it appear that such commutation will be for the best interest of the employe or the dependents of the deceased employe, and that it will avoid undue expense or undue hardship to either party, or that such employe or dependent has removed or is about to remove from the United States, or that the employer has sold or otherwise disposed of the whole or the greater part of his business or assets. Except as provided in section three hundred and ten hereof, and in this section, no commutation of compensation shall be made.

Section 317. At any time after the approval of an agreement or after the entry of the award, a sum equal to all future instalments of compensation may (where death or the nature of the injury renders the amount of future payments certain), with the approval of the Bureau, be paid by the employer to any savings bank, trust company, or life insurance company, in good standing and authorized to do business

in this State, and such sum, together with all interest thereon, shall thereafter be held in trust for the employe or the dependents of the employe, who shall have no further recourse against the employer. The payment of such sum by the employer, evidenced by the receipt of the trustee noted upon the prothonotary's docket, shall operate as a satisfaction of said award as to the employer. Payments from said fund shall be made by the trustee, in the same amounts and at the same periods, as are herein required of the employer, until said fund and interest shall be exhausted. In the appointment of the trustee preference shall be given, in the discretion of the court, to the choice of the employe or the dependents of the deceased employe. Should, however, there remain any unexpended balance of any fund after the payment of all sums due under this act, such balance shall be repaid to the employer who made the original payment, or to his legal representatives.

Section 318. The right of compensation granted by this article of this act shall have the same preference (without limit of amount) against the assets of an employer, liable for such compensation, as is now or may hereafter be allowed by law for a claim for unpaid wages for labor: Provided, however, That no claim for compensation shall have priority over any judgment, mortgage, or conveyance of land recorded prior to the filing of the petition, award, or agreement as to compensation in the office of the prothonotary of the county in which the land is situated. Claims for payments due under this article of this act shall not be assignable, and (except as provided in section five hundred and one of article five hereof) shall be exempt from all claims of creditors, and from levy, execution,

or attachment, which exemption may not be waived.

Section 319. Where a third person is liable to the employe or the dependents for the injury or death, the employer shall be subrogated to the right of the employe or the dependents against such third person, but only to the extent of the compensation payable under this article by the employer. Any recovery against such third person in excess of the compensation theretofore paid by the employer shall be paid forthwith to the employer or to the dependents, and shall be treated as an advance payment by the employer on account of any future instalments of compensation.

ARTICLE IV.

PROCEDURE.

Section 401. The term "Referee" when used in this article shall mean Workmen's Compensation Referee.

The term "Fund" when used in this article shall mean the State *Workmen's* Insurance Fund of this Commonwealth.

The term "employer" when used in this article shall mean the employer as defined in article one of this act, or his duly authorized agent, or his insurer if such insurer has assumed the employer's liability, or the fund if the employer be insured therein.

Section 402. All proceedings before the board or any referee, and all appeals to the board, shall be instituted by petition addressed to the board. All petitions shall be in writing and in the form prescribed by the board.

Section 403. All petitions, all copies of agreements

for compensation, and all other papers requiring action by the board, shall be mailed or delivered to the bureau at its principal office.

Section 404. The bureau shall, immediately upon their receipt, properly file and docket all petitions, agreements for compensation, findings of fact by the board or any referee, awards or disallowances of compensation, or modification thereof and all other reports or papers filed with it under the provisions of this act or the rules and regulations of the board.

Section 405. Immediately upon receiving from the board or any referee any approval or disapproval of any agreement for, or any award or disallownace of, compensation, or any modification thereof, or any other decision, the bureau shall serve a copy thereof on all parties in interest.

Section 406. All notices and copies to which any party shall be entitled under the provisions of this article shall be served by mail, or in such other manner as the board shall direct. For the purposes of this article any notice or copy shall be deemed served on the date when mailed, properly stamped and addressed, and shall be presumed to have reached the party to be served; but any party may show by competent evidence that any notice or copy was not received, or that there was *an* unusual or unreasonable delay in its transmission through the mails. In any such case proper allowance shall be made for the party's failure within the prescribed time to asset any right given him by this act.

The bureau, the *secretary,* and every referee shall keep a careful record of the date of mailing every

notice and copy required by this act to be serv... on the parties in interest.

Section 407. On or after the *tenth* day after any accident shall have occurred, the employer and employe or his *dependents* may agree upon the compensation payable to the employe or his *dependents* under this act; but any agreement made prior to the *tenth* day after the accident shall have ocurred, or permitting a commutation of payments contrary to the provisions of this act, or varying the amount to be paid or the period during which compensation shall be payable as provided in this act, shall be wholly null and void.

All agreements made in accordance with the provisions of this section shall be in writing, and signed by all parties in interest.

All agreements for compensation and all supplemental agreements for the modification, suspension, reinstatement or termination thereof, and all receipts executed by any injured employe of whatever age, or by any dependent to whom compensation is payable under section three hundred and seven, and who has attained the age of sixteen years, shall be valid and binding, unless modified or set aside as hereinafter provided.

Section 408. *All agreements for compensation may be modified, suspended, reinstated or terminated at any time by a supplemental agreement approved by the board, if the incapacity of an injured employe has increased, decreased, recurred or temporarily or finally terminated, or if the status of any dependent has changed.*

Section 409. Whenever an agreement or *supplemental agreement* shall be executed between an employer and an employe or his *dependents* as provided by this act, *such agreement or a duplicate thereof*, signed by all parties in interest, shall be mailed or delivered to the board. It shall be the duty of the board to examine the agreement, and to determine whether it conforms to the provisions of section four hundred and *seven*, and, within thirty days after the copy of the agreement has been mailed or delivered to it, to notify the parties thereto of its validity or invalidity under the aforesaid section: Provided, however, That any payment made in accordance with any agreement prior to the receipt of notice of invalidity shall discharge pro tanto the liability, under article three of this act, of the employer making such payments.

Section 410. If, after any accident, the employer and the employe or his dependents, concerned in any accident, shall fail to agree upon the facts thereof and the compensation due under this act, the employe or his *dependents* may present a claim for compensation to the board.

Section 411. Whenever the employer and the employe or his dependent shall, on or after the *tenth* day after any accident, agree on the facts on which a claim for compensation depends, but shall fail to agree on the compensation payable thereunder, they may petition the board to determine the compensation payable. Such petition shall contain the agreed facts, and shall be signed by all parties in interest. The board shall fix a time and place for hearing the petition, and shall notify all parties in interest. As soon as may be after such hearing, the board shall award or disallow

compensation in accordance with the provisions of this act.

Section 412. If any party shall desire the commutation of future instalments of compensation, he shall present a petition therefor to the board.

Section 413. *The board, or a referee designated by the board, may at any time, review and modify or set aside an original or supplemental agreement, upon petition filed with the board or in the course of the proceedings under any petition pending before such board or referee, if it be proved that such agreement was procured by the fraud, coercion or other improper conduct of a party, or was founded upon a mistake of law or of fact.*

The board, or referee designated by the board, may, at any time modify, reinstate, suspend or terminate an original or supplemental agreement or an award, upon petition filed by either party with such board, and upon proof that the disability of an injured employe has increased, decreased, recurred, or has temporarily or finally ceased, or that the status of any dependent has changed. Such modification, reinstatement, suspension or termination shall be made as of the date upon which it is shown that the disability of the injured employe has increased, decreased, recurred or has temporarily or finally ceased, or upon which it is shown that the status of any dependent has changed.

The board or referee to whom any such petition has been assigned may subpoena witnesses, hear evidence, make findings of fact, and award or disallow compensation, in the same manner and with the same effect and subject to the same right of appeal, as if such petition were an original claim petition.

The filing of a petition to terminate or modify a compensation agreement or reward as provided in this section shall operate as a supersedeas, and shall suspend the payment of compensation fixed in the agreement or by the award, in whole or to such extent as the facts alleged in the petition would, if proved, require.

Section 414. Whenever a claim-petition *or other petition is* presented to the board, the *board* shall, *by general rules or special order, either direct it to be heard by the board or* assign it to a referee for hearing: *Provided, however, That petitions presented under section four hundred and eleven and four hundred and twelve shall be heard by the board.*

The secretary shall serve upon each adverse party a copy of the petition, together with a notice that such petition will be heard by the board or the referee to whom it has been assigned (giving his name and address) as the case may be, and, if the petition shall have been assigned to a referee, shall mail the original petition to such referee, together with copies of the notices served upon the adverse parties.

Section 415. *At any time before an award or disallowance of compensation or order has been made by a referee to whom a petition has been assigned, the board may order such petition heard before it or may reassign it to any other referee. Unless the board shall otherwise order, the testimony taken before the original referee shall be considered as though taken before the board or substituted referee.*

Section 416. Within *ten* days after a copy of *any* petition *has* been served upon any adverse party, he may file *with the secretary if the petition has been*

directed to be heard by the board, or with the referee *if the petition has been assigned to a referee,* an answer in the form prescribed by the board.

Every fact alleged in a petition not specifically denied by an answer so filed by an adverse party shall be deemed to be admitted by him. But the failure of any adverse party or of all of them to deny a fact so alleged shall not preclude the board or a referee before whom the petition is heard from requiring, of its or his own motion, proof of such fact.

Section 417. *As soon as may be after the twelfth day after notice that a petition has been directed to be heard by the board has been served upon the adverse parties thereto, the board shall fix a time and place for hearing the petition. If a petition be assigned to a referee, he shall, twelve days after notice that such petition has been assigned to him has been served upon the adverse parties, fix a time, not less than five nor more than fourteen days thereafter, and a place for hearing the petition. The secretary, if the petition has been directed to be heard by the board, or the referee to whom the petition has been assigned, shall serve upon all parties in interest a notice of the time and place of hearing, and shall serve upon the petitioner a copy of any answer of any adverse party.*

Section 418. *The board if a petition is directed to be heard by it, or the referee to whom a petition is assigned for hearing may subpoena witnesses, order the production of books and other writings, and hear evidence and shall make, in writing and as soon as may be after the conclusion of the hearing, such findings of fact, conclusions of law, and award or disallowance of compensation or other order, as the petition and*

answers and the evidence produced before it or him and the provisions of this act shall, in its or his judgment, require. The findings of fact made by the board in any petition heard by it or upon a hearing de novo shall be final, except as hereinafter provided, and the findings of fact made by a referee to whom a petition has been assigned or any question of fact has been referred under the provisions of section four hundred and nineteen shall be final, unless the board shall, under the provisions of section four hundred and twenty-five of this article, grant a hearing de novo or a rehearing.

Section 419. *The board may refer any question of fact arising under any petition, including a petition for commutation heard by it, to a referee to hear evidence and report to the board the testimony taken before him or such testimony and findings of fact thereon as the board may order. The board may refer any question of fact arising out of any petition assigned to a referee, to any other referee to hear evidence, and report the testimony so taken thereon to the original referee.*

Section 420. The *board or* a referee, if *it or* he deem it necessary, *may of its or his own motion,* either before, *during,* or after any hearing, make an investigation of the facts set forth in the petition *or answer. The board,* or referee with the consent of the board, may appoint one or more impartial physicians or surgeons to examine the injuries of the plaintiff and report thereon, or he may employ the services of such other experts as shall appear necessary to ascertain the facts. The report of any physician, surgeon or expert appointed *by the board* or by a referee shall be filed with *the board or referee, as the case may be,*

and shall be a part of the record and open to inspection *as such.*

The board shall fix the compensation of such physicians, surgeons and experts, *which, when so fixed, shall be paid out of the sums appropriated to the Department of Labor and Industry for the maintenance of the department, and shall be taxed* as part of the costs of the proceedings to be *repaid to such department by either party or* both, as the board may direct. *If any sum so taxed shall not be paid by the party directed to repay, the same may be collected as costs are now collecti*

Section 421. All hearings before the board or before a referee shall be public.

Section 422. Neither the board nor any referee shall be bound by the technical rules of evidence in conducting any hearing or investigation, *but all findings of fact shall be based only upon competent evidence.*

If any party or witness resides outside of the Commonwealth, or through illness or other cause is unable to testify before the board or a referee, his or her testimony or deposition may be taken, within or without this Commonwealth in such manner and in such form as the board may, by special order or general rule, prescribe. The records kept by a hospital of the medical or surgical treatment given to an employe in such hospital shall be admissible as evidence of the medical and surgical matters stated therein, but shall not be concusive proof of such matters.

Section 423. Any party in interest may, within ten days after notice of a referee's award or disallowance

of compensation shall have been served on him, take an appeal to the board on the ground: (1) That the award or disallowance of compensation is not in conformity with the terms of this act, or that the referee committed any other error of law; (2) That the findings of fact and award or disallowance of compensation was unwarranted by the evidence, or *was procured by* fraud, coercion, or other improper conduct of any party in interest. *The board may, upon cause shown, extend the time provided in this article for taking such appeal or for the filing of an answer or other pleading.*

In any such appeal the board may disregard the findings of fact of the referee, and may examine the testimony taken before such referee, and if it deem proper may hear other evidence, and may substitute for the findings of the referee such findings of fact as the evidence taken before the referee and the board, as hereinbefore provided, may, in the judgment of the board, require, and may make such disallowance or award of compensation or other order as the facts so found by it may require.

Section 424. Whenever an appeal shall be based upon an alleged error of law, it shall be the duty of the board to grant a hearing thereon. The board shall fix a time and place for such hearing, and shall serve notice thereof on all parties in interest.

As soon as may be after any such hearing, the board shall either sustain or reverse the referee's award or disallowance of compensation, or make such modification thereof as it shall deem proper.

Section 425. Whenever an appeal shall be taken on the ground that the referee's award *or* disallow-

ance of compensation was unwarranted by the evidence, or because of fraud, coercion, or other improper conduct by any party in interest, the board may, in its discretion, grant a hearing de novo *before the board or assign the petition for rehearing to any referee designated by it* or sustain the referee's award or disallowance of compensation. If the board shall grant a hearing de novo, it shall fix a time and place for same, and shall notify all parties in interest.

As soon as may be after any hearing de novo by the board, it shall in writing state its findings of fact, and award or disallow compensation in accordance with the provisions of this act.

Section 426. *The board, upon petition of any party and upon cause shown, at any time before the court of common pleas of any county of this Commonwealth to whom an appeal has been taken under the provisions of section four hundred and twenty-seven of this article shall have taken final action thereon, may grant a rehearing of any petition upon which the board has made an award or disallowance of compensation or other order or ruling, or has sustained or reversed any action of a referee. If the board shall grant a rehearing of any petition from the board's action on which an appeal has been taken to and is pending in, the court of common pleas of any county of this Commonwealth under the provisions of section four hundred and twenty-seven of this article, the board shall file in such court a certified copy of its order granting such rehearing, and its shall thereupon be the duty of such court to cause the record of the case to be remitted to the board.*

Section 427. *Any party may appeal* from any *action*

of the board on matters of law to the court of common pleas of the county in which the accident occurred or of the county in which the adverse party resides or has a permanent place of business, or, by agreement of the parties, to the court of common pleas of any other county of this Commonwealth. *Such appeal must be brought within ten days after notice of the action of the board has been served upon such party, unless any court of common pleas to which an appeal lies shall, upon cause shown, extend the time herein provided for taking the appeal. The party taking the appeal shall, at the time of taking the appeal, serve upon the adverse party a written notice thereof, setting forth the date of the appeal and the court in which the same is filed, and shall file with his notice of appeal such exceptions to the action of the board as he may desire to take, and shall specify the findings of fact, if any, of the board, or of the referee sustained by the board, which he alleges to be unsupported by competent evidence.*

Upon filing of the notice of an appeal, the prothonotary of the court of common pleas to which the appeal has been taken shall issue a writ of certiorari, directed to the Workmen's Compensation Board, commanding it, within ten days after service thereof, to certify to such court its entire record in the matter in which the appeal has been taken. The writ so issued shall be mailed by the prothonotary to the bureau at Harrisburg, together with a copy of the exceptions. The board shall, within ten days after such service, certify to such court its entire record in the matter in which the appeal has been taken, including the notes of testimony.

Any court before whom an appeal is pending from

any action of the board may remit the record to the board for more specific findings of fact, if the findings of the board or referee are not, in its opinion sufficient to enable it to decide the question of law raised by the appeal.

If the court of common pleas of any county of this Commonwealth shall affirm an award or order of the board or a referee sustained by the board, fixing the compensation payable under this act, the court shall enter judgment for the total amount stated by the award or order to be payable, whether then due and accrued or payable in future instalments. If such court shall sustain the appellant's exceptions to a finding or findings of fact and reverse the action of the board founded thereon, the court shall remit the record to the board for further hearing and determination, in which the procedure shall be the same as that hereinbefore provided in this article in the case of a petition presented to the board, except that the board may order that any part of the testimony taken in the original proceedings shall be considered as though taken in such further hearing.

The prothonotary of any court of common pleas to which an appeal has been taken from the board shall send to the board a certificate of the judgment of the court as soon as rendered, with a copy of any opinion which may be filed in the case. At the end of the period hereinafter allowed for an appeal from the judgment of the court, the record of the board shall be remitted to it by the prothonotary unless an appeal shall have been taken, if such appeal shall be taken, the record shall be remitted to the board by the prothonotary on its return from the appellate court.

Any party may appeal to the Supreme or Superior Court from the judgment of the court of common pleas within thirty days after entry of said judgment. Such appeal shall be taken and prosecuted in the same manner and form and with the same effect as is provided in other cases of appeal to the Supreme or Superior Court, and the record so certified shall contain all that was before the court of common pleas. Any appeal from *the action* of the board to *a court* of common pleas, and from *it* to the Supreme or Superior Court shall take precedence over all other civil *actions.*

Section 428. *At any time after the approval of a compensation agreement or after an award or order has been made by the board or referee, the employe or dependents entitled to compensation thereunder may file a certified copy of the agreement and the order of the board approving the same or of the award or order with the prothonotary of the Court of Common Pleas of any county, and the prothonotary shall enter the total amount of compensation stated in the agreement, award or order to be payable to the employe or his dependents, whether then due and accrued or payable in future instalments, as a judgment against the employer or other party liable under such agreement or award. Such judgment shall be a lien against property of the employer or other party liable under such agreement or award, and execution may issue thereon forthwith.*

Whenever, after an accident, any employe or his dependents shall have entered into a compensation agreement with his employer, or shall file a claim-petition with the board, he may file a certified copy thereof with the prothonotary of the court of common pleas of any county. The prothonotary shall enter the amount

stipulated in any such agreement or claimed in any such petition as judgment against the employer. If the agreement be approved by the board, or compensation awarded as claimed in the petition, the amount of compensation stipulated in the agreement or claimed in the petition shall be a lien, as of the date when the agreement or petition was filed with the prothonotary. Pending the approval of the agreement or the award of compensation, no other lien which may be attached to the employer's property during such time shall gain priority over the lien of such agreement or award; but no execution shall issue on any compensation judgment before the approval of the agreement or the award of compensation on the said petition.

If the agreement be disapproved, or, after hearing, compensation shall be disallowed, the employer may file, with the prothonotary of any county in which the petition or agreement is on record as a judgment, a certified copy of the disapproval of the agreement or disallowance of compensation, and it shall be the duty of such prothonotary to strike off the judgment.

If the amount of compensation claimed be disallowed, but another amount awarded, the compensation judgment shall be a lien to the extent of the award, as of the date of filing the petition with the prothonotary, with the same effect as to other liens and the same disability to issue execution thereon as if the compensation claimed had been allowed. In such cases the prothonotary shall make such modification of the record as shall be appropriate.

If the compensation payable under any agreement or award upon which judgment has been entered under the provisions of this section shall be modified, sus-

pended, reinstated, or terminated by a supplemental agreement executed under the provisions of section four hundred and eight, or by an award or order made under the provisions of section four hundred and thirteen, any party to such judgment, at any time after such agreement has been approved by the board or after the expiration of the time allowed for an appeal from the award or order, may file with the prothonotary of the court of common pleas of any county in which such judgment is on record a certified copy of such supplemental agreement, award or order and it shall thereupon be the duty of the prothonotary to modify, suspend, reinstate or satisfy such judgment in accordance with the terms of such supplemental agreement, award or order.

Execution may arise by first filing with the prothonotary an affidavit that there has been a default in payments of compensation due on any judgment for compensation, entered prior to the approval of the compensation agreement, or an award on petition as soon as such agreement shall have been approved or such award made as evidenced by the approval of the board of the award or by a certified copy thereof.

Execution shall in all cases be for the amount of compensation and interest thereon due and payable up to the date of the issuance of said execution, with costs, and further execution may issue from time to time as further compensation shall become due and payable until full amount of the judgment with costs shall have actually been paid.

Section 429. *If any party against whom a compensation agreement,* award, *or other order fixing the compensation payable under this act has been filed of*

record in any county of this Commonwealth *in accordance with the provisions of section four hundred and twenty-eight of this article, or against whom judgment has been entered by the court of common pleas of any county on any award or order of the board or a referee,* shall, at any time, present to the board receipts or copies thereof, certified by any referee, showing the payment of compensation as required by the agreement or award in full to the date of presentation to the referee, the board shall issue a ceritficate to such party, in the form prescribed, stating the extent to which the judgment on the agreement *or* award has been reduced. Upon the presentation of such certificate to the prothonotary *of the court of common pleas* of any county in which *such* agreement or award *has been filed of* record *as a judgment, or in which judgment on an award has been entered by the court of common pleas,* it shall be the prothonotary's duty to mark *such* judgment satisfied to the extent of the payments so certified, *and upon the presentation to such prothonotary of a certificate issued by the board under the provisions of section three hundred and seventeen of this act, it shall be the duty of the prothonotary to mark such judgment fully satisfied.*

Section 430. The lien of any judgment entered upon any award shall not be divested by any appeal. If, however, the party appealing from the award shall file with the board a bond, in such amount and in such form as the rules and regulations of the board shall direct, the appeal shall, pending its decision, excuse the payment of so much of the compensation as is contested therein; but if the final decision on appeal shall sustain the award, it shall be the duty of the employer by whom such award is payable to make payments of

compensation as from the date of the original award. If on appeal the award is sustained as to a part, it shall be the duty of the employer by whom such part is payable to make payments as from the date of the original award. In case the award is annulled on appeal, it shall be the duty of the prothonotary of any county in which such award has been entered as a judgment to mark it satisfied.

Section 431. The cost of the prothonotary for entering the amount of compensation as provided in this act, or making a modification of the record, or marking the judgment satisfied, shall be allowed, taxed and collected as upon a confession of judgment *on a judgment note.*

Section 432. It shall be the duty of the prothonotary of each court of common pleas, and of the Supreme and Superior Court of the Commonwealth, to make a monthly report to the board of the disposition of all appeals taken to such court under the provisions of this article.

Section 433. *A document on file in the bureau or with the board or any referee, or part of the record of any proceedings taken under Articles III and IV. of this act, shall be proved by a copy thereof, certified by the chairman of the board and attested by the secretary under the seal of the board.*

Section 434. *A final receipt given by an employe or dependent entitled to compensation under a compensation agreement or award reciting that the disability or dependency has terminated, shall be prima facie evidence of the termination of the employer's liability to pay compensation under such agreement or award: Provided, however, That the board, or a referee desig-*

nated by the board, may, at any time, set aside a final receipt, upon petition filed with the board, if it be proved that such receipt was procured by fraud, coercion, or other improper conduct of a party or is founded upon mistake of law or of fact.

ARTICLE V.

GENERAL PROVISIONS.

Section 501. No claim or agreement for legal services or disbursements in support of any demand made or suit brought under the provisions of article two of this act shall be an enforceabble lien against the amount to be paid as damages, or be valid or binding in any respect, unless the same be approved in writing by the judge presiding at the trial, or in case of settlement without trial, by a judge of the common pleas court of the county in which the accident occurred.

No claim or agreement for legal services or disbursements in support of any claim for compensation, or in preparing any agreement for compensation, under article three of this act, shall be an enforceabe lien against the amount to be paid as compensation, or be valid or binding in any other respect, unless the same be approved by the Board. Any such claim or agreement shall be filed with the Bureau, which shall, as soon as may be, notify the person by whom the same was filed of the Board's approval or disapproval thereof, as the case may be.

After the approval as herein required, if the employer be notified in writing of such claim or agreement for legal services and disbursements, the same shall be a lien against any amount thereafter to be paid as damages or compensation: Provided, however,

That where the employer's compensation is payable by the employer in periodical instalments, the Board shall fix, at the time of approval, the proportion of each instalment to be paid on account of legal services and disbursements.

Section 502. If any provision of this act shall be held by any court to be unconstitutional, such judgment shall not affect any other section or provision of this act, except that articles two and three are hereby declared to be inseparable and as one legislative thought; and if either article be declared by such court void or inoperative in an essential part, so that the whole of such article must fall, the other article shall fall with it and not stand alone.

Section 503. Nothing in this act shall affect or impair any right of action which shall have accrued before this act shall take effect.

Section 504. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

Section 505. This act shall not apply in the case of an accident occurring prior to the first day of January next succeeding its passage and approval.

Act of June 3, 1915.

A SUPPLEMENT.

To an act, entitled "The Workmen's Compensation Act of 1915", to exempt domestic servants and agricultural workers from the provisions thereof.

Section 1. Be it enacted, &c., That nothing contained in any article or any section of an act, entitled the Workmen's Compensation Act of 1915, shall apply to or in any way affect any person who, at the time of injury, is engaged in domestic service or agriculture.

Supreme Court of the United States

October Term, 1925

No. 214

PASQUALE LIBERATO and ANNA CAPON LIBERATO, by their Attorney-in-Fact, GIOVANNI DISANTO, Plaintiffs in Error.

vs.

S. A. ROYER and ALBERT HERR, Trading and Doing Business as ROYER & HERR, et al.

In error to the Supreme Court of the State of Pennsylvania

Brief for the Defendants in Error

ARTHUR H. HULL

E. E. BEIDLEMAN

Attorneys for Defendants in Error.

Harrisburg, Pa.

INDEX

REPORT OF OPINIONS IN THE COURTS BELOW

The first opinion in this case was written by Judge John E. Fox, in the Court of Common Pleas of Dauphin County, Pennsylvania, on March 22nd, 1922, and is reported in Dauphin County Reporter, Volume 25, Page 192.

A second opinion was written by the same Judge in the same Court on January 2nd, 1923 and is reported in Dauphin County Reporter, Vol. 26, Page 39.

On July 12th, 1923, Mr. Justice Porter delivered the opinion of the Superior Court of Pennsylvania which is reported in 81 Pennsylvania Superior, 403 (R. 20).

On July 8th, 1924, the Supreme Court of Pennsylvania delivered a per curiam opinion which is reported in 281 Pennsylvania, 227, (R. 30).

STATEMENT OF THE CASE

The statement of the case, as set forth in brief for plaintiffs in error, (Page 3) is correct with the following addition:

The deceased, Guiseppi Liberato did not reject the provisions of the Pennsylvania Workmen's Compensation Act."

ARGUMENT

Is that part of Section 310 of the Pennsylvania Workmen's Compensation Act of 1915, P. L. 736, which reads as follows:

> "Alien widowers, parents, brothers and sisters not residents of the United States shall not be entitled to compensation."

unconstitutional because it contravenes the treaty between the United States and Italy proclaimed November 23rd, 1871 (17 Stat. 845) as amended February 25th, 1913, (38 Stat. 1669) which reads as follows:

> "The citizens of each of the high contracting parties shall receive in the states and territories of the other the most constant security and protection for their persons and property and for their rights, including that form of protection granted by any state or national law which establishes a civil responsibility for injuries or for death caused by negligence or fault and gives to relatives or heirs of the injured party a right of action, which right shall not be restricted on account of the nationality of said relatives or heirs, and shall enjoy in this respect the same rights and privileges as are, or shall be granted to nationals, provided that they submit themselves to the conditions imposed on the latter."

In support of the constitutionality of this Section we urge three propositions:

1st. The relation between the employer and employe is contractual; the terms of the Workmen's Compensation Act constitute the terms of the contract; one of the terms of the contract agreed to by the em-

ploye was that alien non-resident parents shall not be entitled to compensation; the right or absence of the right of a dependent depends upon the contract made and not upon the statute; before the contract was made, to wit: when the employe began work, no right of the dependent existed; therefore in making the contract excluding alien dependent parents, the employe did not waive any right they had; and consequently there is no conflict between the compensation Act and the treaty aforesaid, and that section of the act is constitutional.

2d. The protection granted by the treaty between the United States and Italy, as amended, includes that form of protection granted by state or national law which establishes a civil responsibility for injury or death caused by negligence or fault. That part of Section 310 of the Workmen's Compensation Act in question does not violate the treaty because the Compensation Act does not establish a civil responsibility for injuries or death caused by negligence or fault.

3rd. The protection granted by the treaty between the United States and Italy is limited to a citizen of Italy residing in the United States or the property in the United States of a citizen of Italy, and does not include the person of a citizen of Italy residing in Italy, or the property of a citizen of Italy beyond the jurisdiction of the United States.

Discussion of First Proposition

In the case of Anderson *vs.* Carnegie Steel Company 255 Pa. 33, the constitutionality of the Workmen's Compensation Act was attacked. The Supreme Court held the sections attacked constitutional and based its decision upon the facts that the parties by not rejecting the provisions of the Act created a contract.

In that opinion the Supreme Court on page 39 says the following:

> "It is further urged that Sections 301, 302 and 303, of Article III, of the Act of 1915, are unconstitutional, because they are violative of Article I, Section 6, of our Constitution, which declares that 'trial by jury shall be as heretofore, and the right thereof remain inviolate.' If the foregoing sections are to be binding on an employer or employe in any case, they will be so only after both have agreed they shall be so bound. It is clearly pointed out in Section 302 to each of the contracting parties how either of them may, in a very simple way, prevent the operation of Article III. Neither of them is deprived of a trial by jury except by his own consent, conclusively presumed to have been given, unless withheld in the manner prescribed by the act. Either party, employer or employe, by his statement in writing to the other that the provisions of Article III of the act 'are not intended to apply,' may prevent their application. Nothing is to be found in the said three sections depriving employer or employe of the constitutional right of a trial by jury. They merely permit a waiver of the same, if both so agree, and neither the Federal nor State Constitution precludes such waiver: Krugh *v.* Lycoming Fire Insurance Company, 77 Pa. 15.
>
> "Finally, it is contended that Article III of the Act of 1915, is unconstitutional, because it is violative of Section 21, of Article III, of our Constitution, which provides; "No act of the general assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property; and in case of death from such injuries, the right of action shall survive, and the general assembly shall prescribe for whose bene-

fit such actions shall be prosecuted." It need only be said of this contention that the amount to be recovered for injuries to an employe is limited only when the parties to the contract of employment so agree."

It would seem, therefore, that the Workmen's Compensation Act would be unconstitutional were it not in form and substance merely a draft of the contract which the employer and employe voluntarily entered into.

As above shown, and it has been repeatedly so held in other jurisdictions, that the right to compensation is not statutory but contractual. In other words, the parties voluntarily elect to enter into a system of compensation and the situation is no different whatever than if each individual subscribed their name to a contract embodying the schedule and terms of compensation which they agree on the one part to pay and on the other to receive.

From the standpoint of the contract there is nothing whatever in the treaty with Italy that prohibits an individual employer and an individual alien resident Italian employe from entering into a contract providing that in the event of injury to the employe, certain compensation should be paid, but that in the event of his death, no compensation should be paid to alien nonresident dependents.

It has been repeatedly held and is primarily established under the laws of Pennsylvania that any rights under the compensation law are not rights conferred by virtue of the statute, but that such rights find their real origin in an implied contract between employer and employe. Consequently rights under the compensation law do not come within the language of the treaty and are not "protection granted by a state law

establishing a civil responsibility for injuries or death."

The real question is whether the rights under the compensation act are actually conferred by statute and are, therefore, mandatory or whether they are actually conferred by contract and are elective.

We respectfully contend that the rights are contractual and as was stated by the Supreme Court in Anderson *vs.* Carnegie Steel Company quoting Krugh *vs.* Lycoming Fire Insurance Co., 77 Pa. 15, "they merely permit a waiver of the same (trial by jury) if both so agree, and neither the Federal nor the State Constitution preclude such waiver."

In a contract between an employer and an employe who has dependent alien widower, parents, brothers and sisters, not residents of the United States, the employe expressly contracts for compensation for himself in case of injury and just as expressly contracts that such dependent non-resident alien shall not receive compensation.

The learned judge of the Common Pleas below in his opinion filed January 2, 1923, (R9) seems to agree with the proposition we urge with the exception that he considers the action of the employe in entering into the contract excluding alien non-resident dependents, as waiving a right of such alien non-resident dependents, without the consent of the latter which he holds cannot be done.

Waiver is defined as the intentional relinquishment of a known right. It necessarily follows, therefore, that there can be no waiver unless there is an existing right. At the time the contract between the employer and employe was made, to wit: when the employe began work without rejecting the provisions of the Workmen's Compensation Act as provided for therein, was there any existing right to compensation in such alien non-resident dependent? We respectfully

submit there was no such right for the reason that the rights of dependents to compensation only arose when the contract was made and such rights are determined by the terms of the contract, to wit: the schedules of compensation set forth in the Act. And as the contract expressly provides that alien non-resident dependents shall not receive compensation, no right to compensation to an alien non-resident dependent ever attached, and therefore, the employe in making the contract, did not waive any right such alien non-resident dependent had. In other words the employe had the right to make the contract excluding alien non- resident dependents from receiving compensation because the treaty only applies to rights granted by state or national laws.

Furthermore, if the conclusion of the learned Judge of the Court of Common Pleas is correct on this point, if a resident employe is killed and has dependents, because such dependents were not parties to the contract, he has waived their rights, to wit: the right to sue in which the amount recovered is not limited as in the Compensation Act and, therefore, such dependents, regardless of the Compensation Act, could proceed with their legal remedy and bring an action in trespass for damages.

The conclusion reached by the learned Judge of the Court of Common Pleas in the opinion filed January 2, 1923, (R9) is predicated upon the fact that the employe, when he made his contract with the employer, waived rights of his dependents which the learned court held could not be done because they were not a party thereto.

We have shown that because the relation between the employer and employe is contractual, no rights of dependents existed until the contract was made and because no rights existed at the time the contract was made, no rights of dependent parents were waived.

The learned court below, therefore, erred in determining that the employe waived rights of the dependent parents and the conclusion that the section in question is unconstitutional, which is predicated upon this determination, is, therefore, wrong.

We, therefore, contend that the relation between the employer and employe is contractual, that the terms of the Compensation Act state the terms of the contract, that as one of the terms of the contract agreed to by the employe was that alien non-resident parents should not be entitled to compensation, no right to compensation attached to such dependents, and that in making the contract no right of the alien dependent parents was waived because no right had attached, and that consequently there is no conflict between the compensation act and the treaty aforesaid and the section of the act in question is constitutional.

Discussion of Second Proposition

The treaty provides that citizens of Italy shall be protected in respect to their rights including that form of protection granted by state or national laws, which establishes a civil responsibility for injuries or death caused by *negligence or fault.*

The right to recover compensation under the Compensation Act is not predicated on negligence or fault, but compensation is provided for regardless of the cause or circumstances of the injury except where the injury is intentionally self-inflicted and for this reason the Act does not contravene the treaty.

This point was considered by the Attorney General of Pennsylvania in an opinion which is cited in 43 County Court Reports 205, from which we cite at length:

> "And further, acceptance of the provisions of the Act is not compulsory, and anyone who does

not elect to accept them may sue for full damages in the same manner as heretofore for any injuries sustained.

"The act provides for an elective system of compensation for injuries sustained. It denies to no one any subsisting rights, it merely provides a simpler, surer and more convenient method of enforcing those rights, for those who elect to take advantage of its provisions, and it imposes certain limitations in exchange for benefits conferred, amongst which limitations is the denial to alien widowers, parents, brothers and sisters not residents of the United States of the right to receive, compensation under the act. And in respect of these persons it may be said that it would be obviously unfair to impose on employers the obligation to conduct investigations in obscure parts of foreign countries to protect himself from the claims of alleged dependent parents, brothers and sisters, who were not in fact in any way dependent, whereas wives and minor children require no proof as a rule, one way or the other.

"If an alien workman has dependent parents, brothers or sisters in the home country it will be a comparatively simple matter for him to decline to accept the provisions of the act and retain for himself and for his survivors the rights which he now has."

Discussion of Third Proposition

The treaty between the United States and Italy, ratifications of which were exchanged on November 18th, 1871 (17 Stat. 845) provides inter alia, as follows:

"Article 3. The citizens of each of the high contracting parties shall receive in the states and territories of the other the most constant protec-

tion and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are, or shall be, granted to the natives on their submitting themselves to the conditions imposed upon the natives."

In 1913 Article 3 of the treaty aforesaid was amended so as to read as follows: (38 Stat. 1669)

> "The citizens of each of the high contracting parties shall receive in the states and territories of the other the most constant security and protection for their persons and property, *and for their rights including that form of protection granted by any state or national law which establishes a civil responsibility for injuries or for death caused by negligence or fault and gives to relatives or heirs of the injured party a right of action which right shall not be restricted on account of the nationality of said relatives or heirs*, and shall enjoy in this respect the same rights and privileges as are, or shall be granted to nationals provided that they submit themselves to the conditions imposed on the latter."

In 1897 in Deni vs. P. R. R. Co., 181 Pa. 525, the Supreme Court of Penna. decided that under the Act of April 26, 1855, P. L. 309, which gives a right to recover damages for an injury causing death, a non-resident alien mother has no standing to maintain an action against a citizen of Pennsylvania to recover damages for the death of her son.

The Supreme Court said, inter alia:

> "While it is possible that the language of the statute may admit of a construction which would include non-resident alien husbands and widows, children and parents of the deceased it is a con-

struction so obviously opposed to the spirit and policy of the statute that we cannot adopt it.* * *

"It is intended, primarily, for the benefit of the family of which the deceased was a member.* * *

"There is nothing on the face of the act which limits the protection afforded by it to our own citizens. It is referred to as another illustration of the general rule that we do not legislate for persons beyond our jurisdiction."

Although the plaintiff was an Italian and the case was decided while the treaty between the United States and Italy, of 1871, was operative, the effect of the treaty was not considered.

However, in the case of Maiorano *vs.* Baltimore & Ohio Railroad Company, 216 Pa. 402, the plaintiff also being a subject of Italy, the effect of the aforesaid treaty was considered and the Supreme Court of Pennsylvania sustained the doctrine pronounced in Deni *vs.* Penna. R. R. Co., Supra, and sustained the non-suit that had been entered in the Court below.

The Supreme Court said, inter alia:

"While the treaty, by its terms, includes the entire citizenship of Italy, it is obvious that its provisions can avail those only who, either with respect to their persons or property, are within the jurisdiction of the United States. With respect to particular rights conferred the treaty places those citizens of Italy who bring their persons or property within the covenant relation, upon an exact equality with our own citizens for the time being. Upon withdrawal of persons or property from the jurisdiction of the United States, the rights cease, for in that case they have nothing to operate upon. The plaintiff is a resident of Italy, and so far as appears, has never been within the limits of the

> United States, nor has she at any time had property subject to its laws. * * * A statute right is given our citizens in such case but plaintiff, as we have seen, with respect to any such claim is not within any treaty privileges, but is simply an alien. This being the case the doctrine of Deni *vs.* Penna. Railroad Co. 181 Pa. 522 applies."

This case was appealed to the Supreme Court of the United States, which Court in Maiorano *vs.* Baltimore & Ohio Railroad Co., 213 U. S. 268, sustained the opinion of the Supreme Court of Penna.

The Supreme Court of the United States in that case said, inter alia:

> "It cannot be contended that protection and security for the persons or property of the plaintiff herself have been withheld from her in the territory of the United States because neither she nor her property have ever been within that territory. She, herself, therefore, is entirely outside the scope of the article. * * *
>
> "If an Italian subject sojourning in this country is himself given all the direct protection and security afforded by the laws to our own people, including all rights of actions for himself or his personal representatives to safeguard the protection and security, the treaty is fully complied with, without going further and giving to his non-resident alien relatives a right of action for damages for his death, although such action is afforded to native resident relatives."

Nor does it matter that similar statutes in other states have been construed to extend the right to non-resident aliens for the Supreme Court of the United States in the aforesaid case said:

"The plaintiff was a resident of Italy and a subject of the King of Italy. By the statutory law of the State of Pennsylvania (Act of April 15, 1851, P. L. 669, Par. 18 and 19 as amended by Act of April 26, 1855, P. L. 309 Par. 1.) the right to recover damages for death occasioned by unlawful violence or negligence is in certain cases conferred upon the husband, wife, children or parents of the person killed. By its literal terms the benefits of the statute are extended to all such surviving relatives, irrespective of their condition. It has, however, been held by the Supreme Court of Pennsylvania in the case of Deni *vs.* P. R. R. Co., 181 Pa. 525, as well as in the case at bar that this statute does not give to relatives of the deceased, who are non-residents, the right of action therein provided for. There is nothing to take it out of the general rule that the construction of the state statute by the highest court of the State must be accepted by this Court. It is, therefore, not material that some statutes have been differently construed as, for instance, in Mulhall *vs.* Fallon 176 Mass. 266, and Kellyville Coal Co. *vs.* Petraytis 195 Ill. 217."

Therefore, it is clear by the construction of the Supreme Court of Pennsylvania that the protection afforded citizens of Italy is limited to citizens of Italy residing in Pennsylvania or for their property within the jurisdiction of Pennsylvania, and furthermore that this limitation is recognized by the Supreme Court of the United States.

However, as stated above the treaty in effect when the case of Maiorano *vs.* Baltimore & Ohio R. R. Co. was decided has been amended and we must consider whether the amendment to the treaty has caused any change in its application.

The amendment in addition to protecting "persons and property" also has added "rights" as well as the following: "*Including that form of protection granted by any state or national law which establishes a civil responsibility for injuries or for death caused by negligence or fault.*"

The amendment does not enlarge the class of persons entitled to the protection, and therefore only the persons entitled to the protection under the treaty as it was originally, can be, by the law of Pennsylvania, entitled to protection under the treaty as amended.

The conclusion reached by the learned Judge of the court below in the opinion filed March 22, 1922, is predicated upon the fact that in order for the section of the Compensation Act in question to be constitutional it must give to a citizen of Italy residing in Italy the same rights as a citizen of Italy residing in the United States. We have shown above that in accordance with the law as pronounced in the cases of Deni *vs.* Pennsylvania R. R. Company, supra, and Maiorano *vs.* Baltimore & Ohio R. R. Company, acts of assembly are not intended to operate extra territorially, and the court will not so construe an Act of Assembly unless the legislature expressly so provides. And furthermore, in the case of Maiorano *vs.* Baltimore & Ohio R. R. Company, the Supreme Court of the United States has held that an Act of Assembly which gives the same protection to Italians and their property within the jurisdiction of the United States, as is given to citizens of the United States, but excludes from such protection Italians or their property beyond the jurisdiction of the United States, does not contravene any treaty rights.

In the case of McGovern *v.* Philadelphia & Reading Railway Co., 235 U. S. 389, this Court construed the Federal Employers' Liability Act as applying to non-resident aliens. In that case, however, the Court was

construing a Federal Statute and was not bound by the construction of a State statute by the Supreme Court of the State. Had, however, this Court been construing a State statute and had the State Supreme Court followed the doctrine of the case of Deni *v.* Penna. R. R. Co. 181 Pa. 525 and Maiorano *v.* Baltimore & Ohio R. R. Co., 213 U. S. 268, then, we respectfully submit, this Court would have been obliged to sustain the Supreme Court of the State, notwithstanding there were decisions in other States in conflict therewith.

The Supreme and Superior Courts of Pennsylvania, therefore, were right in holding that the section of the Workmen's Compensation Act in question does not contravene the treaty between Italy and the United States.

We respectfully submit the doctrine set forth in Deni *vs.* P. R. R. Co., and Maiorano *vs.* Baltimore & Ohio R. R. Co., with respect to the persons entitled to the protection under the treaty are just as applicable under the amended treaty as under the original treaty, and since non-resident aliens were not included within that protection under the original treaty, the plaintiffs, who are non-resident aliens, are not entitled to recover in this case.

Conclusion

Wherefore, we respectfully submit the judgment of the Superior and Supreme Courts of Pennsylvania should be affirmed.

ARTHUR H. HULL,
E. E. BEIDLEMAN,
Attorneys for Defendants in Error.

SUPREME COURT OF THE UNITED STATES.

No. 214.—October Term, 1925.

270
13

Pasquale Liberato and Anna Capon Liberato, by their Attorney in fact, Giovanni Disanto, Plaintiffs in Error,
vs.
S. A. Royer and Albert Herr, doing business as Royer & Herr, et al.
} In Error to the Supreme Court of the State of Pennsylvania.

[April 12, 1926.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a claim for compensation under the Workmen's Compensation Act of Pennsylvania. It is for the death of the claimants' son in the employment of the defendants, without negligence or fault on the part of the latter, so far as appears. The son died unmarried and without issue, and the claimants, the plaintiffs in error, were wholly dependent upon him for support; but they were Italians living in Italy. The Compensation Board in obedience to a decision of the Court of Common Pleas awarded $820, and the award was affirmed by that Court. The judgment was reversed by the Superior Court on the ground that the statute expressly provided that 'alien parents . . . not residents of the United States shall not be entitled to any compensation', § 310, and that the Treaty of 1913 with Italy did not cover the case. 81 Pa. Superior Court, 403. The judgment was affirmed by the Supreme Court on the opinion below. 281 Pa. 227. As the plaintiffs contended that the Treaty with Italy invalidated the above clause of the State law and gave them a right to recover, a writ of error was allowed.

Article 3 of the treaty as amended reads: "The citizens of each of the High Contracting Parties shall receive in the States and Territories of the other the most constant security and protection for their persons and property and for their rights, including that form of protection granted by any State or national law which

establishes a civil responsibility for injuries or for death caused by negligence or fault and gives to relatives or heirs of the injured party a right of action, which right shall not be restricted on account of the nationality of said relatives or heirs; and shall enjoy in this respect the same rights and privileges as are or shall be granted to nationals, provided that they submit themselves to the conditions imposed on the latter." 38 Stat. 1669, 1670. This amendment was suggested by the decision in *Maiorano* v. *Baltimore & Ohio R. R. Co.*, 213 U. S. 208, that under the laws of Pennsylvania a nonresident alien widow could not recover for the death of her husband caused by the defendant's negligence, although citizens of the State were given a remedy. Following this suggestion, the words of the amendment, if taken literally, deal only with death caused by negligence or fault. It is natural that they should be limited in that way. Apart from those States, of which Pennsylvania is not one, that very recently have substituted for the common law a general system of quasi-insurance liability without fault is exceptional and usually has not been imposed for death except as the result of a voluntary arrangement. The statutes of Pennsylvania accord with this view of the Treaty. They give to alien nonresident dependent parents the same right to recover damages for death due to fault that they give to citizens and residents. Then the Compensation Act offers a plan different from the common law and the workman is free not to come in under it. If he does, of course all benefits dependent on the new arrangement are matters af agreement and statutory consequences of agreement and cannot be carried further than the contract and statute go. One of those benefits is compensation irrespective of the cause of death, but it is confined to residents. Whether the workman's election to take advantage of the statute could be made a bar to a suit by his parents alleging a wrong is not before us here, but the right to recover without alleging fault depends on the terms of the Act.

We are of opinion that the Treaty was construed rightly by the Courts below. Were it otherwise, and if the excluding clause of the Compensation Act were held void, the question would arise whether the general grant to parents in the plaintiffs' situation could be extended to cover those whom it excluded in terms or whether, notwithstanding a saving clause, § 502, the whole grant would fail, on the ground that it could not be maintained as made

and could not be assumed to go farther. But treaties are not likely to intermeddle with the consequences of voluntary arrangements, if the right is given, as here it was given by other statutes, to sue for death wrongfully caused, at least unless those arrangements made by third persons take away that right. It looks somewhat as if in the first stages of this case that right was supposed to be taken away; but, if so, the question was not saved, and the only question before us is whether the plaintiffs can recover under the Compensation Act, not whether they could recover for a wrongful death, which was not proved or even alleged.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.